

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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235 N.C. APP.

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⁴1 January 2016.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BRIAN THOMAS ATKINSON AND MYERS PARK HOMEOWNERS ASSOCIATION, INC., A
NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFFS

v.

CITY OF CHARLOTTE, A NORTH CAROLINA BODY POLITIC AND CORPORATE,
DEFENDANT AND QUEENS UNIVERSITY OF CHARLOTTE AND JOHNSON C. SMITH
UNIVERSITY, NORTH CAROLINA NON-PROFIT CORPORATIONS, DEFENDANT-INTERVENORS

No. COA13-1226

Filed 29 July 2014

**Zoning—amendment—parking decks—statement of consistency
—not sufficient**

Summary judgment was erroneously granted for defendant and the intervenors in an action involving a zoning amendment for parking decks, and the matter was remanded for the entry of summary judgment in favor of plaintiffs. The undisputed facts established that the City Council failed to comply with N.C.G.S. § 160A-383 when it adopted the amendment in that it could not reasonably have been said that The Statement of Consistency included an explanation as to why the amendment was reasonable and in the public interest.

Appeal by plaintiffs from order entered 26 June 2013 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 March 2014.

Currin & Currin, by Robin T. Currin and George B. Currin, for plaintiff-appellants.

Senior Assistant City Attorney Terrie Hagler-Gray, for defendant-appellee.

ATKINSON v. CITY OF CHARLOTTE

[235 N.C. App. 1 (2014)]

Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot and John H. Carmichael, for defendant-intervenor-appellees.

CALABRIA, Judge.

Brian Thomas Atkinson (“Atkinson”) and Myers Park Homeowners Association, Inc. (“the Association”) (collectively “plaintiffs”) appeal from the trial court’s order granting summary judgment in favor of the City of Charlotte (“the City”) and intervenors Queens University of Charlotte (“Queens”) and Johnson C. Smith University (“Smith”) (collectively “intervenors”). We reverse and remand.

In late 2009, representatives from Queens and other Charlotte residents initiated an amendment (“the amendment”) to the text of the City of Charlotte Zoning Ordinance (“the Zoning Ordinance”). The purpose of the proposed amendment was to exempt certain parking decks from floor area ratio requirements imposed by the Zoning Ordinance.

The City’s Planning Commission (“the Planning Commission”) reviewed the proposed amendment and Planning Commission staff made a written recommendation to the Charlotte City Council (“the City Council”) and to the seven members of the Planning Commission serving on the Department’s Zoning Committee (“the Zoning Committee”) that the amendment should be adopted. After a public hearing, the Zoning Committee voted unanimously to recommend the amendment’s approval to the City Council on 26 May 2010. As part of that recommendation, the Zoning Committee included a statement which found the proposed amendment was consistent with the City’s adopted policies and was reasonable and in the public interest.

On 21 June 2010, the City Council considered the proposed amendment. Mayor Anthony Foxx informed the Council that the Zoning Committee had found the amendment as proposed was consistent with the City’s adopted policies, reasonable, and in the public interest (“the Statement of Consistency”). The City Council voted to approve the Statement of Consistency and the amendment unanimously. Under the terms of the newly-passed amendment, parking decks which were constructed as “an accessory use to an institutional use” were now exempt for the floor area ratio standards of the Zoning Ordinance when the decks were located in single family and multifamily zoning districts.

Atkinson is a property owner in the Myers Park residential area, which is located adjacent to Queens. On 10 December 2012, Atkinson and the Association, on behalf of other Myers Park residents, initiated

ATKINSON v. CITY OF CHARLOTTE

[235 N.C. App. 1 (2014)]

a declaratory judgment action in Mecklenburg County Superior Court seeking to have the amendment invalidated. Plaintiffs alleged that the City Council failed to comply with the requirements of N.C. Gen. Stat. § 160A-383 when it adopted the amendment.

After the City filed its answer to plaintiffs' complaint, Queens and Smith filed a motion to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24 (2013). The trial court granted this motion on 22 March 2013, and intervenors filed their responsive pleading that same day. Subsequently, all parties filed motions for summary judgment. The motions were heard on 24 June 2013. On 26 June 2013, the trial court entered an order granting summary judgment in favor of the City and intervenors. Plaintiffs appeal.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Plaintiffs argue that the trial court erred by granting summary judgment in favor of the City and intervenors because the undisputed facts establish that the City Council failed to comply with N.C. Gen. Stat. § 160A-383 when it adopted the amendment. Specifically, plaintiffs contend (1) that the "Statement of Consistency" adopted by the City Council did not meet the requirements of a "statement" pursuant to that statute; and (2) that the Zoning Committee did not include the entire Planning Commission and thus the Zoning Committee's approval of the amendment also did not meet all statutory requirements. We agree with plaintiffs' first contention and find it to be dispositive. Consequently, we do not address plaintiffs' second contention.

When adopting or rejecting any zoning amendment, the governing board shall also approve a statement describing whether its action is consistent with an adopted comprehensive plan and any other officially adopted plan that is applicable, and briefly explaining why the board considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.

N.C. Gen. Stat. § 160A-383 (2013). Thus,

the statute requires that defendant take two actions in this situation: first, adopt or reject the zoning amendment, and

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[235 N.C. App. 1 (2014)]

second, approve a proper statement. *Id.* The approved statement must *describe* whether the action is consistent with any controlling comprehensive plan and *explain* why the action is “reasonable and in the public interest.”

Wally v. City of Kannapolis, 365 N.C. 449, 452, 722 S.E.2d 481, 483 (2012).

In *Wally*, the plaintiffs were property owners who challenged the rezoning of a nearby property because, *inter alia*, the City of Kannapolis had failed to expressly approve the consistency statement required by N.C. Gen. Stat. § 160A-383. *Id.* at 451, 722 S.E.2d at 482. The Court agreed with the plaintiffs’ argument and held that the challenged zoning amendment was void for failure to comply with the statute’s procedures. *Id.*

In reaching its holding, the *Wally* Court rejected three arguments made by the defendant-city in favor of upholding the amendment. First, the Court rejected the defendant-city’s argument that any judicial review regarding a consistency statement was barred by N.C. Gen. Stat. § 160A-383, explaining that “the statute refers to an approved statement. While an approved statement is not subject to judicial review, the statute does not prohibit review of *whether* the City Council approved a statement, which is the issue here.” *Id.* at 453, 722 S.E.2d at 483. Next, the Court rejected the defendant-city’s argument that it had impliedly approved a consistency statement by virtue of having a staff report which included a consistency statement in its possession at the time the amendment was adopted because “[t]he language of section 160A-383 does not authorize an implied approval.” *Id.* Finally, the Court rejected the defendant-city’s argument that its adoption of a statement “announcing that it acted within the guidelines of its zoning authority” satisfied N.C. Gen. Stat. § 160A-383 because “to meet the statutory requirements, an approved statement must describe whether the zoning amendment is consistent with any controlling land use plan and explain why it is reasonable and in the public interest. The statement adopted by the City Council provides no such explanation or description.” *Id.* at 453-54, 722 S.E.2d at 484.

In the instant case, it is undisputed that the City Council formally adopted and approved the following statement proposed by the Zoning Commission:

STATEMENT OF CONSISTENCY This petition is found to be consistent with adopted policies and to be reasonable and in the public interest

Defendant and intervenors contend that, under *Wally*, since only the issue “of *whether* the City Council approved a [consistency] statement”

ATKINSON v. CITY OF CHARLOTTE

[235 N.C. App. 1 (2014)]

is subject to judicial review, the trial court properly determined that it could not review this statement for compliance with N.C. Gen. Stat. § 160A-383. *Id.* at 453, 722 S.E.2d at 483. Defendant and intervenors are mistaken.

As the *Wally* Court's discussion of the defendant-city's third argument in that case makes clear, judicial review of compliance with N.C. Gen. Stat. § 160A-383 requires more than a cursory review of the record for a statement that could plausibly be considered a consistency statement:

Compliance with section 160A-383 requires more than a general declaration that the action comports with relevant law. Section 160A-383 *explains that to meet the statutory requirements, an approved statement must describe whether the zoning amendment is consistent with any controlling land use plan and explain why it is reasonable and in the public interest. The statement adopted by the City Council provides no such explanation or description.* Rather, it consists of a general declaration that in adopting the zoning amendment, the City Council acted within the guidelines of its zoning authority.

Id. at 453-54, 722 S.E.2d at 484 (emphasis added). Therefore, under *Wally*, judicial review of whether a city has adequately adopted a consistency statement as defined by N.C. Gen. Stat. § 160A-383 is limited to a court's determination of whether a city adopted a consistency statement which contains, at a minimum, both a description of whether the zoning amendment is consistent with any controlling land use plan and an explanation as to why the amendment is reasonable and in the public interest. Once it is determined that a proper statement, which includes a description and explanation, has been adopted, the content of the statement "is not subject to judicial review." N.C. Gen. Stat. § 160A-383.

The Statement of Consistency adopted by the City Council in the instant case cannot reasonably be said to include an "explanation" as to why the amendment is reasonable and in the public interest under the plain meaning of that term. Instead, the statement merely tracks the language of N.C. Gen. Stat. § 160A-383. While this statement attempts to more specifically address the requirements of N.C. Gen. Stat. § 160A-383 than the more generalized statement that the Court rejected in *Wally*, it still suffers from the same fatal flaw: "The statement adopted by the City Council provides no . . . explanation," as required by the statute. *Id.* at 454, 722 S.E.2d at 484. As a result, the City did not comply with

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[235 N.C. App. 6 (2014)]

N.C. Gen. Stat. § 160A-383 when it failed to adopt a proper “statement” as that term is defined by the statute and interpreted by *Wally*, and its purported “Consistency Statement” does not fall within that statute’s protections against judicial review. Accordingly, we reverse the trial court’s order granting summary judgment in favor of defendant and intervenors and remand for the entry of summary judgment in favor of plaintiffs which declares the amendment to be void.

Reversed and remanded.

Chief Judge MARTIN and Judge McGEE concur.

ROBERT PETER DOWD, III AND JONATHAN CARTER DOWD, PLAINTIFFS
v.
CHARLES DEXTER JOHNSON, DEFENDANT

No. COA13-833

Filed 15 July 2014

Process and Service—default judgments—service by publication—improper—no general appearance

The trial court erred by denying defendant’s motions to set aside default judgments because plaintiffs’ service of process by publication was improper. There was no indication in the record that plaintiffs ever attempted service on defendant at his Skyview Drive address, despite having knowledge of said address. Furthermore, defendant did not make a general appearance before the entry of the default judgments and has not waived his objection to improper service of process. Because service by publication on defendant was invalid, the trial court did not possess personal jurisdiction over defendant when it entered the default judgments. As such, these default judgments were void.

Appeal by defendant from orders entered 18 October 2012 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 11 December 2013.

Robbins May & Rich, LLP, by Neil T. Oakley, R. Palmer Sugg, and Robert M. Friesen, for plaintiffs-appellees.

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[235 N.C. App. 6 (2014)]

Gray, Layton, Kersh, Solomon, Furr, & Smith, P.A., by William E. Moore, Jr. and Marcus R. Carpenter, for defendant-appellant.

DAVIS, Judge.

Charles Dexter Johnson (“Defendant”) appeals from the trial court’s 18 October 2012 orders (1) denying his motions to set aside the default judgments entered against him; and (2) awarding Robert Peter Dowd, III and Jonathan Carter Dowd (collectively “Plaintiffs”) \$1,500.00 in attorneys’ fees. On appeal, Defendant contends that the default judgments entered against him were void because Plaintiffs failed to properly serve him with process. After careful review, we reverse the trial court’s order denying Defendant’s motions to set aside the default judgments, vacate its sanctions order awarding attorneys’ fees to Plaintiffs, and vacate the underlying default judgments.

Factual Background

On 29 July 2008, Plaintiffs loaned Defendant \$150,000.00 pursuant to a promissory note that was secured by a deed of trust. The property securing the loan was located in Moore County, North Carolina. Defendant made several payments but eventually defaulted on the loan, and Plaintiffs initiated foreclosure proceedings on the Moore County property. The trial court entered an order of sale authorizing the trustee to proceed with the foreclosure, and Defendant appealed to this Court, arguing that the trial court erred in denying his motion for a continuance. In an unpublished opinion, this Court held that the trial court did not abuse its discretion in denying Defendant’s motion to continue and affirmed the court’s order of sale. *See In re Foreclosure of Johnson*, ___ N.C. App. ___, 729 S.E.2d 128 (2012) (unpublished).

On 24 May 2010, Plaintiffs filed two separate actions in Moore County Superior Court against Defendant. The first action sought recovery of \$57,500.00 based on Defendant’s nonpayment of amounts due under the promissory note. The second action sought reformation of the deed of trust securing the promissory note.¹

That same day, a civil summons was issued to Defendant listing 3574 Turnberry Circle, Fayetteville, North Carolina as his address. The

1. Plaintiffs’ complaint seeking reformation of the deed of trust alleged that both parties intended for two parcels — a 7.3 acre parcel and a 1.44 acre parcel — to secure Defendant’s repayment of the loan but that through a mutual mistake, the deed of trust included a description of only the 1.44 acre parcel.

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[235 N.C. App. 6 (2014)]

Cumberland County Sheriff's Office attempted service at the Turnberry Circle address, but the summons was returned unserved with a notation that Defendant "no longer lives there." Plaintiffs also attempted to serve Defendant at that address via certified mail, but the mail was returned as undeliverable.

On 29 October 2010, a new civil summons was issued listing 2201 Skyview Drive, Fayetteville, North Carolina as Defendant's address. There is no indication in the record, however, that Plaintiffs ever attempted to actually serve Defendant at the Skyview Drive address.

Plaintiffs subsequently commenced service by publication in both actions. A Notice of Service of Process by Publication was published in *The Fayetteville Observer* on 29 November, 6 December, and 13 December 2010.

On 8 February 2011, Plaintiffs filed motions seeking default judgments regarding their claim to recover \$57,500.00 under the promissory note and with respect to their claim for reformation of the deed of trust. Plaintiffs filed accompanying affidavits attesting to their service by publication efforts along with their respective motions. The trial court granted both of Plaintiffs' motions and on 17 March 2011 entered default judgments (1) awarding Plaintiffs \$57,500.00 in damages and \$8,625.00 in attorneys' fees; and (2) reforming the deed of trust to match the property description provided for in the plat recorded in Plat Cabinet 5, slide 109 at the Moore County Register of Deeds office.

On 21 August 2012, Defendant filed a motion for a temporary restraining order seeking to prevent the substitute trustee from commencing the foreclosure sale. On 31 August 2012, Defendant filed motions to set aside the default judgments pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Defendant argued that the default judgments were void because Plaintiffs failed to properly serve him with process such that the trial court lacked personal jurisdiction over Defendant when it entered the judgments. On 28 September 2012, Plaintiffs filed a motion for Rule 11 sanctions, alleging that Defendant's motions to set aside the judgments were not well grounded in fact or supported by existing law.

The trial court denied Defendant's Rule 60(b) motions by order entered 18 October 2012, ruling that Plaintiffs had exercised due diligence in their attempts to locate Defendant and that their service of process by publication as to Defendant was proper. The trial court further ordered that "no Notice of Appeal in this matter shall be filed with or accepted by the Clerk of Superior Court of Moore County until after such time as the Defendant shall have posted an Appeal Bond in the amount

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[235 N.C. App. 6 (2014)]

of Eighty-Eighty Thousand Dollars (\$88,000.00).” Finally, the trial court entered a separate order on 18 October 2012 granting Plaintiffs’ motion for Rule 11 sanctions and ordering Defendant to pay \$1,500.00 in attorneys’ fees.

Defendant attempted to file a notice of appeal from the 18 October 2012 orders on 19 November 2012, but the Moore County Clerk’s Office marked out the file stamp and refused to accept the notice of appeal based on his failure to comply with the trial court’s requirement that he post an appeal bond in the amount of \$88,000.00. On 8 May 2013, this Court granted *certiorari* to review the trial court’s 18 October 2012 orders denying Defendant’s motions to set aside the default judgments and granting Plaintiffs’ motion for sanctions.

Analysis**I. Default Judgments**

Defendant’s primary argument on appeal is that the trial court erred in denying his motions to set aside the default judgments because Plaintiffs’ service of process by publication was improper. We agree.

A trial court may set aside and relieve a defendant from a default judgment if the judgment entered is void. *See* N.C.R. Civ. P. 55(d) (“[I]f a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)”; N.C.R. Civ. P. 60(b) (“[T]he court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . [if] [t]he judgment is void . . .”).

A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void. If a default judgment is void due to a defect in service of process, the trial court abuses its discretion if it does not grant a defendant’s motion to set aside entry of default.

Jones v. Wallis, 211 N.C. App. 353, 356, 712 S.E.2d 180, 183 (2011) (citations and quotation marks omitted).

After Plaintiffs’ attempts to serve Defendant at the Turnberry Circle address were unsuccessful, Plaintiffs elected to serve Defendant by publication in *The Fayetteville Observer*. Rule 4(j1) of the North Carolina Rules of Civil Procedure permits service of process by publication on a party that cannot, through due diligence, be otherwise served. *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003). Rule 4(j1) provides as follows:

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[235 N.C. App. 6 (2014)]

A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served. . . .

N.C.R. Civ. P. 4(j1).

Because service by publication is in derogation of the common law, “statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute.” *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980). In determining whether service of process by publication is proper, this Court first examines whether the defendant was actually subject to service by publication — meaning that the plaintiff exercised due diligence as required by Rule 4(j1) prior to serving the defendant by publication. *Jones*, 211 N.C. App. at 357, 712 S.E.2d at 183. “Due diligence dictates that plaintiff use all resources reasonably available to [him] in attempting to locate defendants. Where the information required for proper service of process is within plaintiff’s knowledge or, with due diligence, can be ascertained, service of process by publication is not proper.” *Id.* (citation and quotation marks omitted).

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In this case, we conclude that service of process by publication was improper because there is no indication in the record that Plaintiffs ever attempted service on Defendant at his Skyview Drive address despite having knowledge of said address. Indeed, the record shows that on 29 September 2010, approximately two months before Plaintiffs commenced service by publication, Defendant's counsel sent Plaintiffs' counsel an email stating as follows:

One other thing I forgot to include. [Defendant] has asked me to provide you with his current mailing address, which is as follows: 2201 Skyview Dr., Fayetteville, NC 28304.

Thx, steve

Although Plaintiffs caused a summons to be issued listing this address, the record is devoid of any evidence that service was ever actually attempted on Defendant at 2201 Skyview Drive. Indeed, Plaintiffs do not dispute the absence of such evidence in the record.

While the record reflects that Defendant has had numerous mailing addresses throughout this litigation, this cannot excuse Plaintiffs' failure to attempt service at the address provided by Defendant's counsel and described as Defendant's "current mailing address." Because Plaintiffs did not try to serve Defendant personally or by certified mail at the Skyview Drive address, we cannot conclude that they exercised the due diligence required before resorting to service by publication. *See Thomas v. Thomas*, 43 N.C. App. 638, 646, 260 S.E.2d 163, 169 (1979) ("[S]ervice of process by publication is void . . . if the information required for personal service is within the plaintiff's actual knowledge or with due diligence could be ascertained.").

Plaintiffs contend that Defendant nevertheless submitted to the jurisdiction of the trial court — thereby waiving any alleged defects in service of process — by (1) filing a motion for a temporary restraining order; and (2) seeking injunctive and declaratory relief in his motions to set aside the default judgments. Plaintiffs' argument is without merit.

It is well established that by making a general appearance, a defendant "waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof." *Tobe-Williams v. New Hanover Cty. Bd. of Educ.*, ___ N.C. App. ___, ___ S.E.2d ___, slip op. at 16 (No. COA13-679) (filed Jun. 17, 2014) (citation omitted). In this case, however, Defendant "did nothing that could be considered a general appearance prior to the entry of the [judgments] now challenged." *Barnes v. Wells*, 165 N.C. App. 575, 579, 599 S.E.2d 585, 588 (2004). Defendant is

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challenging the validity of default judgments entered on 17 March 2011 based on improper service of process. It was not until *after* the entry of the 17 March 2011 judgments that Defendant filed his motion for a temporary restraining order (on 21 August 2012) and his motions to set aside the default judgments (on 31 August 2012).

As we have previously explained, “[i]f the trial court lacked personal jurisdiction over [the party] when it entered the order, actions subsequent to that order could not retroactively supply jurisdiction.” *Id.* at 580, 599 S.E.2d at 589. Because Defendant did not make a general appearance before the entry of the default judgments, he has not waived his objection to improper service of process. *See id.* (concluding that party did not waive personal jurisdiction objection based on improper service in moving for relief from order pursuant to Rule 60(b) because party did not make any general appearances prior to entry of order being challenged).

Because service by publication on Defendant was invalid, the trial court did not possess personal jurisdiction over Defendant when it entered the 17 March 2011 default judgments. As such, these default judgments are void, and the trial court erred by denying Defendant’s motions to set them aside. Consequently, we must reverse the trial court’s 18 October 2012 order denying Defendant’s motions to set aside and vacate the underlying default judgments. *Cotton*, 160 N.C. App. at 704, 586 S.E.2d at 808-09.

II. Sanctions Order

We must also vacate the trial court’s 18 October 2012 sanctions order. In its order, the trial court granted Plaintiffs’ motion to impose Rule 11 sanctions against Defendant and ordered Defendant to pay \$1,500.00 in attorneys’ fees “incurred in the successful defense of Defendant’s most recent motions.”

Rule 11 states, in pertinent part, as follows:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification,

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or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C.R. Civ. P. 11(a). If a pleading, motion, or paper is signed in violation of Rule 11, the trial court “shall impose . . . an appropriate sanction, which may include an order to pay the other party . . . reasonable expenses . . . including a reasonable attorney’s fee.” *Id.*

It is well established that analysis under Rule 11 is three-pronged, requiring the trial court to determine whether the pleading, motion, or paper is (1) factually sufficient; (2) legally sufficient; and (3) not filed for an improper purpose. *In re Will of Durham*, 206 N.C. App. 67, 71, 698 S.E.2d 112, 117 (2010). “A violation of any one of these requirements mandates the imposition of sanctions under Rule 11.” *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994).

Here, we have already concluded that Defendant’s motions to set aside the default judgments for lack of personal jurisdiction based on improper service were factually and legally meritorious. As such, Rule 11 sanctions are not appropriate based on either of the first two prongs. Accordingly, Rule 11 sanctions could only be appropriate if Defendant’s motions were filed for an improper purpose. *See Durham*, 206 N.C. App. at 72, 698 S.E.2d at 118 (“The improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements. . . . Thus, even if a paper is well grounded in fact and in law, it may still violate Rule 11 if it is served or filed for an improper purpose.” (citations, quotation marks, and alterations omitted)).

“An improper purpose is any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.” *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation and quotation marks omitted). When determining whether a motion was filed for an improper purpose, the relevant inquiry is “whether the existence of an improper purpose may be inferred from the alleged offender’s objective behavior.” *Id.*

Here, we have found no evidence in the record suggesting that Defendant filed his motions to set aside the default judgments for any improper purpose. Furthermore, the trial court’s sanctions order did not contain any findings indicating that Defendant filed his motions for any such improper purpose, instead relying on its determination that the motions were not well grounded in fact or law to support its conclusion

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that sanctions were appropriate. *See Page v. Roscoe, LLC*, 128 N.C. App. 678, 686, 497 S.E.2d 422, 428 (1998) (concluding that improper purpose prong of Rule 11 was not violated where there was no evidence suggesting that complaint was filed for improper purpose and trial court made no such findings). As such, Rule 11 sanctions were not appropriate in this case, and we vacate the trial court's sanctions order.²

Conclusion

For the reasons stated above, we (1) reverse the trial court's order denying Defendant's Rule 60(b) motions; (2) vacate the order granting Plaintiffs' motion for sanctions; and (3) vacate the underlying default judgments entered 17 March 2011.

REVERSED AND VACATED.

Judges STEELMAN and STEPHENS concur.

2. Defendant also challenges the validity of the \$88,000.00 appeal bond set by the trial court. The authority of a trial court to impose an appeal bond is limited by statute. Plaintiffs contend that the bond imposed was appropriate under N.C. Gen. Stat. § 1-292, which requires an appellant to execute a bond of "a sum to be fixed by a judge" in order to stay execution of a judgment "direct[ing] the sale or delivery of possession of real property." N.C. Gen. Stat. § 1-292 (2013). Because the trial court's 18 October 2012 order denying Defendant's motions to set aside the default judgments did not "direct[] the sale or delivery of possession of real property," N.C. Gen. Stat. § 1-292 does not apply. However, because we granted *certiorari* to review the trial court's 18 October 2012 orders and Defendant was not ultimately required to execute the \$88,000.00 appeal bond, we need not address with specificity each of Defendant's arguments regarding the validity of the appeal bond.

E. PRIDE, INC. v. SINGH

[235 N.C. App. 15 (2014)]

EASTERN PRIDE, INC., KENNETH E. MOOREFIELD AND WIFE,
LYNN B. MOOREFIELD, PLAINTIFFS

v.

GURDIAL SINGH AND WIFE, AMANDIP KAUR, DEFENDANTS

No. COA14-167

Filed 15 July 2014

Deeds—restrictive covenants—prohibition of convenience store

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of plaintiffs declaring that the construction and operation of a Family Dollar store upon plaintiffs' real property did not violate the restrictive covenant contained in a deed which prohibited the operation of a "convenience store" on that tract. The language in the deed merely prevented the type of store that could operate on the vacant tract.

Appeal by Defendants from order entered 15 November 2013 by Judge Gary E. Trawick in Nash County Superior Court. Heard in the Court of Appeals on 19 May 2014.

Hornthal, Riley, Ellis & Maland, L.L.P., by L. Phillip Hornthal, III, and Graebe Hanna & Sullivan, PLLC, by Christopher T. Graebe, for Plaintiffs-appellees.

Nigle B. Barrow, Jr., for Defendants-appellants.

DILLON, Judge.

Gurdial Singh and Amandip Kaur ("Defendants") appeal from a trial court's ruling granting summary judgment in favor of Eastern Pride, Inc., Kenneth E. Moorefield, and Lynn B. Moorefield ("Plaintiffs") declaring that the construction and operation of a Family Dollar store upon Plaintiffs' real property does not violate the restrictive covenant contained in a deed, which prevents certain uses of said property. For the following reasons, we affirm the trial court's order.

I. Background

Plaintiffs commenced this action, seeking a declaratory judgment that a restrictive covenant prohibiting the use of their real property "as a convenience store" would not be violated by the construction and operation of a Family Dollar store. Defendants filed their responsive

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pleading seeking, *inter alia*, injunctive relief to prevent the construction and operation of a Family Dollar store on Plaintiffs' property. The parties filed cross motions for summary judgment. The evidence presented to the trial court on these motions tended to show as follows: As of 2006, Plaintiffs Kenneth and Lynn Moorefield ("the Moorefields") owned two adjacent tracts of land in Rocky Mount. One tract was developed as a convenience store (the "Convenience Store Tract"); the other tract was undeveloped (the "Vacant Tract"). On or about 29 December 2006, the Moorefields contracted to sell the Convenience Store Tract to Defendants. As part of the agreement, the Moorefields and Defendants agreed that certain restrictive covenants would be placed on the Convenience Store Tract and the Vacant Tract. Pursuant to this agreement, the Moorefields conveyed the Convenience Store Tract to Defendants by deed (the "Deed") which was recorded in the Nash County Registry on 10 January 2007. The Deed contained the following restrictive covenant language:

1) The [Convenience Store Tract] shall be used solely as a convenience store with gas pumps and no portion may be used nor may there be operated thereon an adult bookstore, adult video store, or an adult entertainment facility. ***As long as Grantee operates a convenience store on the [Convenience Store Tract] the Grantor may not use [the Vacant Tract] or any portion as a convenience store.***

....

4) These restrictions shall be binding upon and inure to the benefit of Grantor and Grantee, their heirs, successors and assigns.

(Emphasis added.)

On 18 July 2012, the Moorefields entered an agreement to sell the Vacant Tract to Eastern Pride, Inc., who intended to construct a building thereon to be leased to Family Dollar Stores of North Carolina, Inc. for the operation of one of its stores. On 12 September 2012, Family Dollar Stores executed a "Letter of Intent" to lease the Vacant Tract from Eastern Pride at some point after Eastern Pride purchased the tract from the Moorefields. However, on 9 October 2012, Defendants' counsel sent a letter to the Moorefields contending that the restrictive covenant contained in the 2007 Deed prohibited the operation of a Family Dollar store on the Vacant Tract.

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On 15 November 2013, the trial court entered an order allowing Plaintiffs' motion for summary judgment, denying Defendants' motion for summary judgment, and declaring that "[a] Family Dollar Store is not a 'convenience store' as prohibited in the Deed[.]" the construction and operation of a Family Dollar store did not violate the restrictive covenants in the deed, and a copy of the order was to be recorded in the register of deeds' office. On 10 December 2013, Defendants gave notice of appeal from the trial court's order.

II. Standard of Review

In appeals from a trial court's ruling from a party's motion for summary judgment from a declaratory judgment ruling,

[s]ummary judgment may be granted in a declaratory judgment proceeding where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Steiner v. Windrow Estates Home Owners Ass'n, 213 N.C. App. 454, 456-57, 713 S.E.2d 518, 521-22 (2011) (citations omitted). Interpretation of the language of a restrictive covenant is generally a question of law reviewed *de novo* by this Court. See *Moss Creek Homeowners Ass'n v. Bisette*, 202 N.C. App. 222, 228, 689 S.E.2d 180, 184 (observing that "restrictive covenants are contractual in nature.") (citation omitted)), *disc. rev. denied*, 364 N.C. 242, 698 S.E.2d 402 (2010); *Harris v. Ray Johnson Const. Co., Inc.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (stating that contract interpretation is a matter of law, reviewed *de novo*).

III. Analysis

Defendants contend that the trial court erred in granting summary judgment in favor of Plaintiffs and declaring that the construction and operation of a Family Dollar store on the Vacant Tract did not violate the restrictive covenants prohibiting the operation of a "convenience store" on that tract. We disagree.

"In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n*, 158 N.C. App. 518, 521, 581 S.E.2d 94, 96 (2003) (emphasis in original). "However,

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this intention may not be established by parol. Neither the testimony nor the declarations of a party is competent to prove intent.” *Schwartz v. Banbury Woods Homeowners Ass’n*, 196 N.C. App. 584, 591, 675 S.E.2d 382, 388 (2009), *disc. review denied*, 363 N.C. 856, 694 S.E.2d 391 (2010). “[A]ny ambiguities in the restrictions are to be resolved in favor of the free and unrestricted use of the land.” *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). That is, as our Supreme Court has explained, any doubt should be resolved in favor of “the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.” *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967). This “rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.” *Erthal v. May*, ___ N.C. App. ___, ___, 736 S.E.2d 514, 518 (2012), *appeal dismissed and disc. review denied*, 366 N.C. 421, 736 S.E.2d 761 (2013).

Applying these principles to the present case, we believe that, for the reasons stated below, the operation of a Family Dollar store does not violate the restrictive covenant in the Deed, and, therefore, hold that the trial court did not err in granting summary judgment to Plaintiffs.

The term “convenience store” is not defined in the restrictive covenant language in the Deed. We have held that “[u]nless the covenants set out a specialized meaning, the language of a restrictive covenant is interpreted by using its ordinary meaning.” *Erthal*, ___ N.C. App. at ___, 736 S.E.2d at 522. A dictionary with the copyright date on or about the time the restrictive covenant was executed “is an appropriate place to ascertain the then customary definitions of words and terms.” *Angel v. Truitt*, 108 N.C. App. 679, 683, 424 S.E.2d 660, 663 (1993) (applying a definition from the 1982 edition of *The American Heritage Dictionary* to determine the customary definition of the term “mobile home” as used in a restrictive covenant executed in 1981) (citation omitted)).

Here, the restrictive covenants were entered into in 2006. “[C]onvenience store” is defined as “[a] small retail store that is open long hours and that typically sells staple groceries, snacks, and sometimes gasoline.” *The American Heritage Dictionary of the English Language*, 401 (4th. ed. 2000). *The Merriam-Webster’s Collegiate Dictionary*, also defines “convenience store” as “a small often franchised market that is open long hours.” *Id.* at 272 (11th. ed. 2003). Using these accepted

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definitions, the ordinary meaning of the words show that a key feature of a “convenience store” is its small size, long store hours, and it sells some groceries, snacks, and sometimes gasoline.

A Family Dollar store, however, is more accurately described as a discount store, rather than as a convenience store. For instance, in a Form 10-K filed with the Securities and Exchange Commission, Family Dollar Stores, Inc. states that its “stores are generally open seven days a week and operate between the hours of 8:00 a.m. and 9:00 p.m.”; that its store size is typically between 7,500 and 9,500 square feet; and that it sells “quality merchandise at everyday low prices” with the majority of products priced at \$10 or less and offering “a focused assortment of merchandise . . . such as health and beauty aids, packaged food and refrigerated products, home cleaning supplies, housewares, stationery, seasonal goods, apparel, and home fashions.” The Family Dollar letter of intent with Eastern Pride states that the proposed building for the Vacant Tract would be 8,320 square feet.

Looking at the dictionary definitions for “convenience store” cited above, we do not believe a retail store occupying a 8,320 square-foot space is a “small retail store”; and, further, it is at best ambiguous whether a store which is open only 13 hours per day constitutes being open for “long hours.” We further note that none of above definitions for a convenience store state that it typically sells products at discount prices, like a Family Dollar store. We further note that the code assigned to a Family Dollar store under the North American Industrial Classification System (“NAICS”)¹ is not the code assigned by NAICS to convenience stores generally. Specifically, the NAICS code assigned to Family Dollar stores is 452990, whereas the NAICS code generally assigned to convenience stores selling gas is 447110 and the NAICS code generally assigned to convenience stores not selling gas is 445120. Accordingly, we do not believe that a Family Dollar Store falls within the ordinary definition of a “convenience store.”

It is apparent that Defendants do not want an establishment operating on the Vacant Tract which sells products which they sell in their convenience store on their Convenience Store Tract. Defendants could have negotiated that the restrictive covenant contain language prohibiting

1. The NAICS is a number system used by businesses and governmental agencies throughout North America. For instance, the United States Department of Labor's Bureau of Labor Statistics utilizes the NAICS, describing it as a “framework to group establishments into industries based on the activity in which they are primarily engaged.” <http://www.bls.gov/bls/naics.htm>.

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certain types of goods from being sold from a store operating on the Vacant Tract; however, such language limiting the type of products that can be sold on the Vacant Tract is not in the Deed. Rather, the language in the Deed merely prevents the *type of store* that can operate on the Vacant Tract. Certainly, the restrictive covenant at issue would not prevent a Food Lion grocery store or a Wal-Mart store from operating on the Vacant Tract since they are clearly not “convenience store[s],” even though they sell many of the same products that are sold in convenience stores.

We have reviewed the other arguments raised by Defendants in their brief and find them unpersuasive. Accordingly, we affirm the trial court’s order.

AFFIRMED.

Chief Judge MARTIN and Judge STEELMAN concur.

JONATHAN RUSSEL FOLMAR AND MARGARET FOLMAR, PLAINTIFFS
v.
SAMUEL DAVID KESIAH AND LOUIE KESIAH, SARAH HARRIS AND
COOKE REALTY, INC., DEFENDANTS

No. COA13-1297

Filed 15 July 2014

1. Appeal and Error—appealability—appropriate court for filing notice of appeal

Because the summary judgment order entered in Union County was final as to plaintiffs’ claims against the Kesiah defendants and the proceedings that occurred in Brunswick County subsequent to the entry of summary judgment had no impact on the summary judgment order in favor of the Kesiah defendants, it was not error for the plaintiffs to file their notice of appeal in the “appropriate court” in Union County.

2. Fraud—misrepresentation—no reasonable reliance—due diligence

The trial court did not err by granting summary judgment in favor of the Kesiah defendants on plaintiffs’ claims of fraud and misrepresentation where the evidence failed to establish reasonable

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reliance by plaintiffs. Any reliance would have been unreasonable in light of plaintiffs' independent home inspection report. Plaintiffs neither alleged nor produced any evidence that the alleged defects were not discoverable in the exercise of due diligence.

3. Pleadings—summary judgment—ripeness—affidavit required

Although plaintiffs argue that the forecast of evidence demonstrated that summary judgment was not ripe for hearing and that summary judgment should have been denied or the hearing continued, N.C.G.S. § 1A-1, Rule 56(f) required an affidavit by the opposing party stating the reasons why they were unable to present the necessary opposing material and the record revealed that plaintiffs failed to do so.

Appeal by plaintiffs from order entered 26 April 2013 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 9 April 2014.

DeVore Acton & Stafford, PA, by F. William DeVore, IV and Fred W. DeVore, III for plaintiff-appellants.

Perry, Bundy, Plyler, Long & Cox, LLP, by H. Ligon Bundy and Natalie J. Broadway for defendant-appellees.

McCULLOUGH, Judge.

Plaintiff-homebuyers appeal from a summary judgment entered in favor of defendant-homeowners for their claims of fraud and misrepresentation, breach of contract, and punitive damages. Based on the reasons stated herein, we affirm the order of the trial court.

I. Background

On 15 October 2012, plaintiffs Jonathan Russel Folmar and Margaret Folmar filed a complaint against defendants Samuel David Kesiah and Louis Kesiah (collectively the "Kesiah defendants"), as well as against Sarah Harris and Cooke Realty, Inc. Sarah Harris ("Harris") and Cooke Realty, Inc. ("Cooke Realty") are not parties to this appeal.

The complaint alleged that on 30 March 2012, plaintiffs entered into a purchase agreement ("agreement") with the Kesiah defendants regarding real property located on Private Drive in Ocean Isle Beach, North Carolina ("the property"). Harris, a real estate agent, and Cooke Realty served as dual agents for both plaintiffs and the Kesiah defendants. Prior

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to closing, Harris went to the property with Darryl Moffett, a contractor hired by plaintiffs. Moffett was originally hired to paint and complete minor repair work for plaintiffs after closing but had arranged to meet Harris in order to determine the “scope of the work involved.” While on the property, Moffett noticed a “deteriorated section of wall cladding on the front elevation next to the entry door.” Moffett “pressed his hand against the wall, and a piece of wall cladding fell off, exposing rotted oriented strand board (“OSB”) sheathing.” Plaintiffs alleged that other defects were also discovered by Moffett in direct view of Harris. Plaintiffs alleged that despite the fiduciary and contractual obligations of Harris to plaintiffs, Harris never informed plaintiffs of the defects found at the property.

Relying on the representations made by Harris, Cooke Realty and the Kesiah defendants, plaintiffs paid \$349,000.00 for the property at closing. Immediately following closing, plaintiffs discovered:

a substantial number of defects with the home, including but not limited to: interior water stains at windows and walls, delamated [sic] or missing cedar shingles, rotted wall cladding, one area on the front elevation wall exhibited previous repairs that included the installation of new beveled cedar lap siding and felt underlayment over wet and rotted wood sheathing, many areas of wood rot throughout the exterior of the building, etc.

Plaintiffs alleged that the Kesiah defendants had actual knowledge of the defects of the property, yet had checked “No” on the State of North Carolina Residential Property and Owners’ Association Disclosure Statement (“the disclosure”) in regards to the aforementioned areas. Plaintiffs also alleged that all defendants were aware of the defects found in the property prior to closing and were “responsible to disclose these defects to Plaintiffs prior to closing.”

Plaintiffs claimed they had been damaged in excess of \$10,000.00 and alleged the following claims: fraud and misrepresentation, breach of contract, and punitive damages against the Kesiah defendants; fraud and misrepresentation, breach of fiduciary duty, unfair and deceptive trade practices, and punitive damages against defendants Harris and Cooke Realty.

On 19 November 2012, the Kesiah defendants filed an answer. On 19 March 2013, the Kesiah defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

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Following a hearing held at the 22 April 2013 session of Union County Superior Court, the trial court entered summary judgment in favor of the Kesiah defendants and dismissed plaintiffs' action with prejudice as to the Kesiah defendants on 26 April 2013.

On 20 June 2013, defendants Harris and Cooke Realty filed an amended motion to change venue from Union County to Brunswick County. On 12 July 2013, the trial court entered an order transferring the file to the Brunswick County Clerk of Superior Court. On 1 August 2013, Union County filed an "Acknowledgement of Receipt of Transferred Case File."

On 22 August 2013, plaintiffs voluntarily dismissed their claims against Harris and Cooke Realty without prejudice.

Plaintiffs filed notice of appeal on 28 August 2014 in Union County Superior Court. Plaintiffs are appealing the entry of the 26 April 2013 order granting summary judgment in favor of the Kesiah defendants and dismissing plaintiffs' action with prejudice as to the Kesiah defendants.

II. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Hamby v. Profile Prods., LLC*, 197 N.C. App. 99, 105, 676 S.E.2d 594, 599 (2009) (citation omitted).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. The movant may meet this burden by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Collingwood v. Gen. Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted).

"The standard of review for a trial court's ruling on a motion for summary judgment is *de novo*. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own

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judgment for that of the trial court.” *Horne v. Town of Blowing Rock*, ___ N.C. App. ___, ___, 732 S.E.2d 614, 618 (2012) (citations and quotation marks omitted).

III. Discussion

On appeal, plaintiffs argue that the trial court erred by (A) granting summary judgment in favor of the Kesiah defendants where plaintiffs established a prima facie showing of fraud and misrepresentation by the Kesiah defendants and where plaintiffs exercised due diligence prior to purchasing the home and were not put on notice of the substantial defects prior to the sale of the property. Plaintiffs also argue that (B) the forecast of evidence demonstrated that summary judgment was not ripe for hearing.

[1] As a preliminary matter, we address the Kesiah defendants’ argument that our Court should dismiss plaintiffs’ appeal as it is not properly before us. The Kesiah defendants contend that because the trial court entered an order on 12 July 2013 transferring the present case from Union County to Brunswick County, plaintiffs should have thereafter filed notice of appeal in Brunswick County. The Kesiah defendants assert that plaintiffs’ filing of notice of appeal on 28 April 2014 in Union County was not in compliance with the North Carolina Rules of Appellate Procedure and that their appeal should be dismissed for lack of jurisdiction.

We note that Rule 26(a) of the North Carolina Rules of Appellate Procedure, entitled “Filing and service” provides that “[p]apers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the *appropriate court*.” N.C. R. App. P. 26(a) (2013) (emphasis added). Article II of the North Carolina Rules of Appellate Procedure governs appeals from judgments and orders of superior courts and district courts. Rule 3 of Article II, entitled “Appeal in civil cases – How and when taken” provides as follows:

(a) *Filing the notice of appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court[.]

N.C. R. App. P. Rule 3(a) (2013).

In the case *sub judice*, plaintiffs’ complaint was initiated in Union County Superior Court. The order granting summary judgment in favor of the Kesiah defendants was entered in Union County Superior Court

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and was final as to plaintiffs' claims against the Kesiah defendants. Thereafter, the remaining defendants, Harris and Cooke Realty, filed a motion to change venue to Brunswick County. The trial court granted this motion and transferred the file to Brunswick County on 12 July 2013 for "further proceedings as may be necessary or appropriate."

Because the summary judgment order entered in Union County was final as to plaintiffs' claims against the Kesiah defendants and because the proceedings that occurred in Brunswick County subsequent to the entry of summary judgment had no impact on the summary judgment order in favor of the Kesiah defendants, we hold that it was not error for the plaintiffs to file their notice of appeal in the "appropriate court" in Union County. Accordingly, we proceed to the merits of plaintiffs' appeal.

A. Fraud and Misrepresentation

[2] First, plaintiffs argue that the trial court erred by granting summary judgment in favor of the Kesiah defendants where plaintiffs established a prima facie showing of fraud and misrepresentation by the Kesiah defendants. In the event that our Court finds that a genuine issue of material fact exists as to plaintiffs' fraud and misrepresentation claim, plaintiffs also argue that there is a genuine issue of material fact as to their contract and punitive damages claims. Based on the following reasons, we reject plaintiffs' contentions.

The essential elements of actionable fraud are (1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. Additionally, plaintiff's reliance on any misrepresentations must be reasonable.

MacFadden v. Louf, 182 N.C. App. 745, 747, 643 S.E.2d 432, 434 (2007) (citations omitted).

In the present case, plaintiffs assert that the Kesiah defendants falsely represented material facts: by marking "no" on the disclosure which stated "to your knowledge is there any problem (malfunction or defect)" with things such as the foundation, slab, floors, windows, doors, ceilings, interior and exterior walls, patio, deck, or other structural components; learning of the defects in the property sometime after 2006 and intentionally listing the property below value to "entice buyers as opposed to correcting the defects"; previously performing work on the windows, sheathing, exterior walls, etc. prior to selling

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the home to plaintiffs and covering up existing rot with new materials; and having knowledge that many of the areas of the property were missing sheathing.

The Kesiah defendants argue that even assuming *arguendo* that they had knowledge of the defects of the property prior to selling the property to plaintiffs, any reliance by plaintiffs to the Kesiah defendants' alleged misrepresentations were not reasonable. We agree with the Kesiah defendants.

In *MacFadden v. Louf*, 182 N.C. App. 745, 643 S.E.2d 432 (2007), a homebuyer brought an action against the seller for alleged undisclosed defects in the subject property. *Id.* at 745, 643 S.E.2d at 433. The trial court granted summary judgment in favor of the seller and the homebuyer appealed to our Court, arguing that the trial court had erred by granting summary judgment on her claims for fraud and negligent representation. *Id.* at 746, 643 S.E.2d at 433. Our Court noted that

[w]ith respect to the purchase of property, [r]eliance is not reasonable if a plaintiff fails to make any independent investigation unless the plaintiff can demonstrate: (1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations.

Id. at 747-48, 643 S.E.2d at 434 (citations and quotation marks omitted).

Our Court held that the homebuyer failed to show "reasonable reliance" based on evidence that the homebuyer had conducted a home inspection prior to closing on the subject property. The inspection report "put her on notice of potential problems with the home" by instructing her to have a roofing contractor inspect the roof for the potential of water to pond above the kitchen/breeze-way area. *Id.* at 748, 643 S.E.2d at 434. The inspection report also noted, *inter alia*, water staining, previous water leakage, rusted and leaking gutters, and an uneven floor system which showed signs of previous moisture and pest infestation. *Id.* The homebuyer argued that "[d]espite the findings of the home inspection report, . . . she relied on the Residential Disclosure Statement completed by [the seller.]" *Id.* at 748, 643 S.E.2d at 435. However, our Court held that "any reliance on [the disclosure] would have been unreasonable in light of her own home inspection report which recommended that she have the roof evaluated by a roofing contractor and that she inquire or

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monitor the other problem areas.” *Id.* at 749, 643 S.E.2d at 435. Based on the foregoing reasons, the *MacFadden* Court affirmed the granting of summary judgment in favor of the seller on the claims of fraud and negligent misrepresentation. *Id.*

Upon thorough review, we find the facts in the case *sub judice* similar to the facts found in *MacFadden*. On 14 February 2012, the Kesiah defendants marked “no” on the disclosure which stated “to your knowledge is there any problem (malfunction or defect)” with things such as the foundation, slab, floors, windows, doors, ceilings, interior and exterior walls, patio, deck, or other structural components. However, plaintiffs subsequently conducted an independent home inspection on 23 February 2012, prior to closing on the property. The home inspection report noted several potential issues. In regards to the exterior of the property, the following was noted: as to the wall cladding: cedar shakes, “some of the siding is missing and there is some wood rot on the wall above front door”; “[u]pstairs door off the master has some wood rot and is very hard to open, also storm door has damaged the frame”; “[t]he window on the back left side looks to have water entering from the top of the window, staining is inside of window. Possible hidden damage may exist.” In regards to the interior of the property, the inspection report noted the following: “[w]all paper in front left bathroom is peeling due to shower head leaking”; “[w]ater stains present in the family room but were tested and found no active leak.” Additionally, the home inspection report made a recommendation to plaintiffs that “[e]ach issue indicated in this summary should be evaluated by a qualified contractor or specialist for corrective measures to insure proper and safe use or service of the system in question.” Notwithstanding the findings and recommendations made in the home inspection report, plaintiffs proceeded to the closing on 30 March 2012.

It is clear from the record that plaintiffs were not denied the opportunity to investigate the property and that plaintiffs were not induced to forego additional investigations by the Kesiah defendants’ alleged misrepresentations. Had plaintiffs heeded the recommendation of the home inspection report that the aforementioned issues be evaluated by a specialist, it is likely that plaintiffs would have discovered the alleged defects to the house prior to closing. Accordingly, we hold that the trial court did not err by granting summary judgment in favor of the Kesiah defendants on plaintiffs’ claims of fraud and misrepresentation where the evidence fails to establish reasonable reliance by plaintiffs, as any reliance on the disclosure would have been unreasonable in light of plaintiffs’ independent home inspection report.

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Next, plaintiffs rely on *Everts v. Parkinson*, 147 N.C. App. 315, 555 S.E.2d 667 (2001), to argue that they exercised due diligence prior to purchasing the home and that the inspection report did not put plaintiffs on notice of the substantial defects of the property. Plaintiffs argue that the “majority of the numerous material defects [of the property] were not discovered until after the closing, and were concealed behind the exterior wall cladding.” Because the inspection report only had a “brief description of some issues[.]” plaintiffs contend that they were not put on notice of the defects alleged in their complaint. Based upon a thorough review, we find the facts found in *Everts* to be distinguishable from the circumstances of the present case.

In *Everts*, the plaintiff-homebuyers filed a complaint against the original owners of a house – Mr. and Mrs. Parkinson, the builders, and the company that performed improvement work on the house, alleging claims of fraud, negligent misrepresentation, breach of contract, breach of express warranty, breach of implied warranty, and negligence. The complaint alleged that the plaintiffs had to undertake extensive and costly repairs to the house as a result of water intrusion and wood rot problems. *Id.* at 318, 555 S.E.2d at 670. The trial court granted summary judgment in favor of the defendants on all claims against them and the plaintiffs appealed. *Id.* Our Court noted that after the Parkinsons moved into the house, they experienced numerous problems with window lights, rotting brick mold, and a rotting window. *Id.* at 321-22, 555 S.E.2d at 672. Subsequently, Mr. Parkinson replaced the window lights, performed brick mold repair work on a number of windows and doors, and completed extensive repair work to the particular window at issue. *Id.* at 324, 555 S.E.2d at 673-74. In regards to the requirement of an “intent to deceive,” our Court found that Mr. Parkinson had engaged in such conduct by not informing the plaintiffs about any of the repair work and testifying that he did not disclose this information to the plaintiffs because “he did not feel that he had an obligation to do so[.]” *Id.* at 324, 555 S.E.2d at 674.

In regards to the requirement of showing reasonable reliance in cases of fraud, our Court noted that a duty to disclose material facts arises “[w]here material facts are accessible to the vendor only, *and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser.*” *Id.* at 325, 555 S.E.2d 674 (citation omitted) (emphasis in original). Our Court found that there were genuine issues of material fact as to whether the alleged defects were discoverable in the exercise of the plaintiffs’ “diligent attention or observation and, therefore, whether Mr. Parkinson had a duty to

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disclose the defects.” *Id.* at 327, 555 S.E.2d at 675. The record contained an affidavit from a licensed residential home inspector who performed an inspection on the house at issue at the request of the plaintiffs prior to purchase. He testified to the following:

at the time of the inspection, he “did not observe any rot or water infiltration,” or “any problems with the exterior windows or doors on the house.” He further testified that the “decorative bands,” which had been installed around the windows before his inspection, “concealed the joint where the synthetic stucco met the window brick molding” and that, as a result, he “was not able to visually observe the perimeter joints of the exterior windows.” He also stated that he “was not informed by the owner or the owner’s realtor of any moisture intrusion problems involving the windows or window joint perimeter prior to [his] inspection,” and that such information is “crucial information that [he] would have needed to know.”

Id. Based on the foregoing, our Court held that, viewing the evidence in the light most favorable to the plaintiffs, Mr. Parkinson knew of the alleged defects, knew that the defects, “of which [the] plaintiffs were unaware, were not discoverable in the exercise of [the] plaintiffs’ diligent attention or observation[,]” and, therefore, had a duty to disclose the existence of the defects to the plaintiffs, which he failed to do. *Id.* at 327-28, 555 S.E.2d at 675. As to Mr. Parkinson, our Court reversed the trial court’s summary judgment on the claim of fraud. *Id.* at 328, 555 S.E.2d at 676.

In the present case, plaintiffs neither alleged in their complaint nor produced any evidence that the alleged defects were not discoverable in the exercise of due diligence. Rather, as we previously stated, plaintiffs’ inspection report recommended that they have a qualified contractor or specialist evaluate the noted issues. Also dissimilar to the facts found in *Everts*, both of the Kesiah defendants testified through affidavits that they “did not know of any unrepaired deterioration of the house when we signed the disclosure statement or before the closing took place.” Thus, we reject plaintiffs’ contentions that they exercised due diligence and were not put on notice of the alleged defects of the property.

B. Ripe for Hearing

[3] In their last argument, plaintiffs argue that the forecast of evidence demonstrated that summary judgment was not ripe for hearing and that summary judgment should have been denied or the hearing continued.

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Plaintiffs assert that they intended to locate and depose Mr. Dennis Harold, the Kesiah defendants' contractor who allegedly made repairs on the property.

Rule 56(f) of the North Carolina Rules of Civil Procedure provides the following:

When affidavits are unavailable. – Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

N.C. Gen. Stat. § 1A-1, Rule 56(f) (2013). Rule 56(f) “gives the trial court the discretion to refuse the motion for judgment or order a continuance, *if the opposing party states by affidavit* the reasons why he is unable to present the necessary opposing material.” *Gillis v. Whitley's Discount Auto Sales, Inc.*, 70 N.C. App. 270, 274, 319 S.E.2d 661, 664 (1984) (emphasis added).

In the present case, while plaintiffs argue that their intent to depose Mr. Harold “could be inferred by a cursory reading” of the affidavit of their contractor, Darryl Moffett, we find this to be inadequate. Rule 56(f) requires an affidavit by the opposing party stating the reasons why they were unable to present the necessary opposing material and the record is clear that plaintiffs failed to do so. Thus, we reject plaintiffs' arguments that summary judgment was not ripe for hearing.

IV. Conclusion

Where we hold that the trial court did not err by granting summary judgment in favor of the Kesiah defendants on the claims of fraud and misrepresentation and where we reject plaintiffs' argument that summary judgment was not ripe for hearing, we affirm the 26 April 2013 order of the trial court.

Affirmed.

Judges ELMORE and DAVIS concur.

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[235 N.C. App. 31 (2014)]

FRANKENMUTH INSURANCE, AS SUBROGEE OF CATAWBA COUNTRY CLUB, PLAINTIFF
v.
CITY OF HICKORY, A NORTH CAROLINA MUNICIPAL CORPORATION, AND MORGAN FIRE &
SAFETY, INC., A NORTH CAROLINA CORPORATION D/B/A UNIFOUR FIRE &
SAFETY, DEFENDANTS

No. COA14-70

Filed 15 July 2014

Negligence—professional negligence—standard of care—expert testimony

The trial court did not err in a professional negligence case arising from water leaks in the plumbing of a clubhouse by granting summary judgment against plaintiff insurance company and in favor of defendant, a municipal corporation providing water to the clubhouse insured by plaintiff. Because the negligence claims could not have been properly evaluated with the common knowledge and experience of the jury, plaintiff bore the burden of producing expert testimony to establish the proper standard of care to which defendant should have been held. Because plaintiff failed to carry its burden of establishing a standard of care, the trial court's order granting summary judgment in defendant's favor was affirmed. Defendant's alternative argument on appeal that plaintiff was contributorily negligent was not addressed.

Appeal by plaintiff from order entered 14 May 2013 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 6 May 2014.

Dean Gibson Hofer & Nance, PLLC, by Jeremy S. Foster, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Patrick H. Flanagan, for defendant-appellee City of Hickory.

HUNTER, Robert C., Judge.

Frankenmuth Insurance ("plaintiff"), as a subrogee of Catawba Country Club ("the Club"), appeals from an order granting the City of Hickory's ("defendant's") motion for summary judgment on plaintiff's negligence claim. On appeal, plaintiff argues that the trial court erred by entering summary judgment in favor of defendant because genuine

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issues of material fact existed as to whether: (1) defendant negligently operated its municipal water system, and (2) the Club was contributorily negligent in its installation of sprinkler system pipes.

After careful review, we affirm the trial court's order.

Background

On 5 July 2009, a water pipe leading to the Club's sprinkler system burst, causing damage to the clubhouse. The Club was insured by plaintiff, which filed this action against defendant as the Club's subrogee. In the complaint, plaintiff alleged that defendant's negligent care of the municipal water system, specifically in allowing unreasonably high water pressure to build up in the pipes, was the proximate cause of the damage.

In 2000, the Club hired Crawford Sprinkler Company ("Crawford") to install a sprinkler system on its grounds. Defendant sent members of its Fire Prevention Office to the site to measure the water pressure of the area. The standing water pressure was 180 pounds per square inch ("psi"). Kevin Greer ("Greer"), the Assistant Public Services Director for defendant, testified during deposition that 180 psi was not an uncommon standing water pressure in that service area. The average citywide standing water pressure was 115 to 120 psi, with some areas in the system attaining pressures of 230 to 240 psi.

It is undisputed that Crawford designed a sprinkler system that called for eight-inch ductile iron pipes to be used throughout, given the 180 psi standing water pressure at the Club. However, Crawford actually installed six-inch PVC piping instead. Greer explained in his testimony that piping comes in two forms—PVC and ductile iron. PVC piping has two different pressure ratings—Class 150 psi and Class 200 psi; ductile iron comes in Class 250 psi and Class 350 psi. The ductile iron pipes are designed to constantly withstand standing water pressures within their class range, but they can also handle pressure surges of two-and-a-half times the class rating so long as the surges are not prolonged or sustained.

Stephen Basic ("Basic"), the Club's General Manager, testified during deposition that soon after installation of the sprinkler system, the Club had continual problems with water pressure. According to Basic, the PVC pipes burst six times due to excess water pressure from 2000 through July 2009, with the sixth burst forming the basis of this action. One of these bursts occurred on 27 July 2007. Morgan Fire & Safety, doing business as Unifour Fire & Safety ("Unifour"), repaired this break

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in the line and replaced a three-foot section of the PVC pipe with ductile iron. One of Unifour's employees testified during deposition that it replaced the PVC piping with ductile iron because ductile iron is stronger than PVC.

The flooding that forms the basis of this action occurred on 5 July 2009. Martin Chang ("Chang"), plaintiff's expert witness, visited the Club on 15 July 2009 to investigate the cause of the fracture. Chang was a forensic engineer; he received a bachelor's and master's degree in textile engineering but had no experience in designing or running a municipal water system. After speaking with Busic and examining the site, Chang determined that: (1) a longitudinal fracture was found on the six-inch PVC pipe, indicating stress produced by internal pressure; (2) the fire sprinkler pressure gauge failed at a pressure greater than 300 psi; and (3) the cause of the failure was excessive water pressure from defendant's water supply and potentially a sudden surge in water pressure. Chang noted triangular fractures in the ductile iron reducers, but admitted that he could not rule out mechanical mistakes made during excavation of the pipe as the cause of the fractures. Greer agreed with Chang's assessment that the longitudinal fracture was caused by internal pressure. However, he developed the opinion that the cause of the fracture was due to inferior piping material, given that the six-inch PVC pipes actually installed were of lesser strength than the minimum Class 250 psi eight-inch ductile iron pipes that were called for in Crawford's plan.

After making insurance payouts to the Club, plaintiff brought this action against defendant and Unifour. It alleged that Unifour was liable for the damages, in part, because it "[n]egligently failed to recommend removal of the six-inch PVC pipe and . . . replacement with eight-inch ductile iron pipe for the entire distance between the pit and the clubhouse." Plaintiff alleged that defendant was negligent when it: (1) "negligently failed to ensure that the water pressure in its municipal water supply did not exceed reasonable levels"; (2) "negligently failed to correct the layout of its municipal water distribution system with a 'loop' system to protect residents at the terminal ends against excess pressures, water hammer, and shock waves within the water distribution system"; and (3) "negligently failed to recommend or install a pressure-relieving device to prevent damage from excess water pressures."

Defendant and Unifour filed motions for summary judgment in April 2013. Both parties were awarded summary judgment in May 2013. Plaintiff timely appealed from both orders granting summary judgment but subsequently withdrew its appeal as to Unifour.

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Discussion**I. Summary Judgment for Defendant**

Plaintiff argues that summary judgment was inappropriate where genuine issues of material fact existed as to whether: (1) defendant was negligent in its operation of the municipal water system, and (2) plaintiff was contributorily negligent. Because plaintiff has failed to carry its burden of establishing a standard of care for defendant's alleged professional negligence, we affirm the trial court's order granting summary judgment in defendant's favor.

"This Court reviews orders granting summary judgment de novo." *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007). Summary judgment is appropriate "only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal quotation marks omitted). The burden of proof rests with the movant to show that summary judgment is appropriate. *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). We review the record in the light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Because "the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court," summary judgment is rarely an appropriate remedy in cases of negligence or contributory negligence. *Thompson v. Bradley*, 142 N.C. App. 636, 641, 544 S.E.2d 258, 261 (2001) (internal quotation marks omitted). However, summary judgment is appropriate in a cause of action for negligence where "the forecast of evidence fails to show negligence on defendant's part, or establishes plaintiff's contributory negligence as a matter of law." *Stansfield v. Mahowsky*, 46 N.C. App. 829, 830, 266 S.E.2d 28, 29 (1980). "[A] [p]laintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper." *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996) (internal quotation marks omitted).

Although the complaint states only a claim for "negligence," this cause of action is actually one for "professional negligence" because plaintiff is alleging negligent performance by defendant in its professional capacity as the operator of a municipal water system. *See Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008) (characterizing negligence action brought against the City of Burlington for

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failure to warn, failure to investigate, and negligent misrepresentation as professional negligence where the defendant was installing a potable waterline). Defendant admitted in its answer that it “has all of the corporate powers as set forth in [the North Carolina General Statutes for municipal corporations][.]” When a municipal corporation operates a system of waterworks and sells water for private consumption and use, “it is acting in its proprietary or corporate capacity and is liable for injury or damage resulting from such operation to the same extent and upon the same basis as a privately owned water company would be.” *Mosseller v. Asheville*, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966).

In a professional negligence action, the plaintiff bears the burden of showing: “(1) the nature of the defendant’s profession; (2) the defendant’s duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.” *Huffman Oil Co., Inc.*, 190 N.C. App. at 271, 661 S.E.2d at 11 (emphasis and internal quotation marks omitted). “Where common knowledge and experience of the jury is [not] sufficient to evaluate compliance with a standard of care,” the plaintiff is required to establish the standard of care through expert testimony. *Id.* “The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit is to see if this defendant’s actions lived up to that standard[.]” *Associated Indus. Contr’rs, Inc. v. Fleming Eng’g, Inc.*, 162 N.C. App. 405, 410, 590 S.E.2d 866, 870 (2004) (internal quotation marks omitted), *aff’d*, 359 N.C. 296, 608 S.E.2d 757 (2005). If the plaintiff fails to establish the proper standard of care through expert testimony in a professional negligence claim, summary judgment for the defendant is proper. *Huffman Oil Co.*, 190 N.C. App. at 271, 661 S.E.2d at 11.

This Court has previously held that the “common knowledge” exception to the requirement that the standard of care be established by expert testimony applies either when the actions are “of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation.” *Associated Indus. Contractors, Inc.*, 162 N.C. App. at 411, 590 S.E.2d at 871. In *Associated Indus. Contractors, Inc.*, this Court held that a surveyor’s actions fell within the “common knowledge” exception because a trier of fact could adequately determine whether the surveyor correctly measured ninety-degree angles in its design of a rectangular building site. *Id.* at 411-12, 590 S.E.2d at 871. It noted that “where . . . the service rendered does not involve esoteric knowledge or uncertainty

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that calls for the professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance." *Id.* (citation and quotation omitted).

Here, plaintiff asserted that defendant was negligent in three ways: (1) failing to ensure that water pressure did not exceed reasonable levels; (2) failing to install a "loop" system in its municipal water distribution system to prevent excessive pressures at the terminal ends of the water line; and (3) failing to install or recommend that the Club install a pressure-relieving device. Unlike the measuring of ninety-degree angles in *Associated Indus. Contractors, Inc.*, the alleged wrongdoing of defendant here required the exercise of professional judgment regarding a "reasonable" level of water pressure in a municipal water system, the skill needed to install a "loop" system, and the expertise to install or recommend installing a pressure-relieving device at the terminal ends of the system. Because these claims could not be properly evaluated with the "common knowledge and experience" of the jury, plaintiff bore the burden of producing expert testimony to establish the proper standard of care to which defendant should have been held. *See Huffman Oil Co., Inc.*, 190 N.C. App. at 271, 661 S.E.2d at 11.

Plaintiff failed to meet this burden. Chang, plaintiff's sole expert witness, specifically testified that he had not studied defendant's facility, did not know what type of water distribution system defendant used, had no experience in designing or running a municipal water system, and did not know of anything defendant may have done to create an increase in water pressure. Basic, the Club's General Manager, testified that he had no experience or training in the field of plumbing at all. Although Chang and Basic testified that the six-inch PVC pipe installed by Crawford burst due to internal pressure, neither could identify what a reasonable municipal corporation providing water to the Club would do given the facts of this case. Nor could they identify any action taken by defendant that might have caused a sudden increase in water pressure.

Thus, plaintiff essentially argues that because defendant could have prevented the six-inch PVC piping erroneously installed into the Club's sprinkler system from bursting, they necessarily breached a duty owed to the Club by failing to do so. However, absent expert testimony establishing the standard of care that defendant owed the Club, plaintiff failed to provide a context to assess whether defendant's conduct differed from what it should have done. *See Associated Indus. Contractors, Inc.*, 162 N.C. App. at 410, 590 S.E.2d at 870. Thus, by leaving the standard of care unresolved, plaintiff failed to "offer legal evidence tending to establish beyond mere speculation or conjecture every essential

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[235 N.C. App. 37 (2014)]

element of negligence[.]” *Fun Services-Carolina, Inc.*, 122 N.C. App. at 162, 468 S.E.2d at 263. In other words, “without evidence of the applicable standard of care, [plaintiff] [has] failed to establish a *prima facie* claim for professional negligence.” *Huffman Oil Co.*, 190 N.C. App. at 272, 661 S.E.2d at 11-12. Accordingly, summary judgment for defendant was proper, and we need not address defendant’s alternative argument on appeal—that plaintiff was contributorily negligent. *Id.*; *see also Huffman Oil Co.*, 190 N.C. App. at 271, 661 S.E.2d at 11 (holding that summary judgment in favor of the defendant City of Burlington was proper where the plaintiff failed to provide expert testimony establishing the applicable standard of care).

Conclusion

Because plaintiff failed to establish a standard of care in its professional negligence claim, we affirm the trial court’s grant of summary judgment in defendant’s favor.

AFFIRMED.

Judges McGEE and ELMORE concur.

JOHN E. GRAVEN, JR. AND KATHRYN L. WALL, EMPLOYEES, PLAINTIFFS

v.

N.C. DEPT. OF PUBLIC SAFETY-DIVISION OF LAW ENFORCEMENT
(FORMERLY N.C. DEPT. OF CRIME CONTROL AND PUBLIC SAFETY), EMPLOYER, DEFENDANT
AND CORVEL CORPORATION, THIRD-PARTY ADMINISTRATOR

No. COA14-6

Filed 29 July 2014

Workers’ Compensation—automobile accident after holiday lunch—coming and going rule

The Industrial Commission correctly concluded that plaintiffs failed to meet their burden of proving that an automobile accident arose out of and in the course of plaintiffs employment where the accident occurred while they were returning from a holiday lunch in a car owned by defendant. None of the exceptions to the “coming and going” rule fit the situation since the vehicle was provided as an accommodation, plaintiffs were attending a social event, and the risk involved in the travel was common to the public.

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[235 N.C. App. 37 (2014)]

Appeal by Plaintiffs from opinion and award entered 2 October 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 May 2014.

Patterson Harkavy LLP, by Narendra K. Ghosh; Baddour, Parker, & Hine, P.C., by Phillip A. Baddour, Jr.; and Narron, O'Hale & Whittington, P.A., by O. Hampton Whittington, Jr., for Plaintiffs-Appellants.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Sharon Patrick-Wilson, for Defendant-Appellee.

DILLON, Judge.

John E. Graven, Jr. and Kathryn L. Wall (“Plaintiffs”) appeal from the North Carolina Industrial Commission’s opinion and award denying their claims for benefits. For the following reasons, we affirm.

I. Background

Plaintiffs filed workers’ compensation claims for injuries sustained on 16 December 2010, which were subsequently denied by their employer, the North Carolina Department of Public Safety (“Defendant”). Plaintiffs’ claims were consolidated for hearing before Deputy Commissioner Stephen T. Gheen, who entered an opinion and award concluding *inter alia* that Plaintiffs each sustained a compensable work-related injury by accident arising out of and in the course of their employment.

On 15 March 2013, Defendant employer appealed to the Full Commission (“the Commission”). On 2 October 2013, the Commission filed an opinion and award, reversing the deputy commissioner’s decision and denying Plaintiffs workers’ compensation benefits. A summary of the parties’ stipulations and uncontested findings of fact in the Commission’s opinion and award tended to show as follows:

Plaintiffs worked as technical support analysts in the State Highway Patrol (“SHP”), a division of Defendant, as technical support analysts with the Technical Services Unit providing software training to State Troopers and civilians in Raleigh and around the State. They worked four days per week, from 7:00 a.m. until 5:00 p.m., and were permitted to take a 30-minute paid lunch break.

In December 2010, Plaintiffs’ supervisor sent out three emails over the course of several days inviting employees, including Plaintiffs, to attend a lunch (hereinafter the “holiday lunch”) to be held at a particular

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public restaurant on 16 December 2010 “to celebrate the department’s hard work.” Attendance was voluntary, and attendees were required to pay for their own meals, though they benefitted from a group discount offered by the restaurant. Plaintiffs decided to attend the holiday lunch and rode to the restaurant in a state-owned vehicle, which had been signed out by another SHP employee. Less than half of the SHP employees who were invited actually attended the holiday lunch. Attendance was not taken at the lunch. No awards were presented at the lunch. No formal speeches were given at the lunch; however, three supervisors made brief remarks, welcoming the attendees and thanking them for their service.

After the lunch, while Plaintiffs were traveling on a public street returning to the SHP office in the state-owned vehicle, the driver, who was also a SHP employee, encountered a patch of ice and lost control of the vehicle, causing it to collide with a tree. As a result of this accident, Plaintiff Graven was paralyzed from the chest down, and Plaintiff Wall sustained a concussion and some cuts and bruises. SHP employee Sergeant Taylor testified that even though Plaintiffs rode in a state-vehicle it was not authorized for use to attend the holiday lunch and if the vehicle had been requested for the purpose of attending the holiday lunch that request would have been denied.

Based on its findings, the Commission concluded that Plaintiffs’ injuries did not arise out of or occurred within the course and scope of their employment. Plaintiffs appeal from the Commission’s opinion and award denying them coverage.

II. Standard of Review

“[W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission’s findings of fact and whether those findings support the Commission’s conclusions of law.” *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 183, 639 S.E.2d 429, 432 (2007) (citation, brackets, ellipsis, and quotation marks omitted). Unchallenged findings of fact, however, “are presumed to be supported by competent evidence and are binding on appeal.” *Bishop v. Ingles Markets, Inc.*, __ N.C. App. __, __, 756 S.E.2d 115, 118 (2014) (citation and quotation marks omitted).

In the present case, Plaintiffs challenge certain findings made by the Commission and also the Commission’s conclusion that Plaintiffs failed to show by the preponderance of the evidence that their “injuries arose out of and or occurred within the course and scope of their employment.” Accordingly, our review will consist of determining whether the

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challenged findings are supported by the evidence and whether the sustained challenged findings and the unchallenged findings and stipulations support the Commission's conclusion.

III. Analysis

The workers' compensation system in North Carolina is "a creature of statute enacted by our General Assembly" and codified in the Workers' Compensation Act. *Frost*, 361 N.C. at 184, 639 S.E.2d at 432. Our Supreme Court has stated as follows regarding this system:

The social policy behind the Workers' Compensation Act is twofold. First, the Act provides employees with swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. Second, the Act insures limited liability for employers. Although, the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory perimeters.

Id. (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986)).

The remedies provided under the Act do not apply to all injuries that may be suffered by an employee, but only to those injuries which are caused by accidents "arising out of and in the course of the employment[.]" N.C. Gen. Stat. 97-2(6) (2013). "[W]hether an injury arose out of and in the course of employment is a mixed question of law and fact[.]" *Fortner v. J.K. Holding Co.*, 319 N.C. 640, 643, 357 S.E.2d 167, 168 (1987) (citations and quotation marks omitted). The burden is on the employee to prove by a preponderance of the evidence that the accident causing him injury arose out of and occurred during the course of his employment. *Taylor v. Twin City Club*, 260 N.C. 435, 437, 132 S.E.2d 865, 867 (1963); *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (2005). In the present case, we must determine whether the Commission erred in its conclusion that Plaintiffs failed to meet their burden of proving that their injuries sustained in the 16 December 2010 automobile accident while returning to work from a social event arose out of and occurred in the course of their employment and therefore covered under the Workers' Compensation Act.

In its opinion and award, the Commission cited two cases where our appellate courts have considered whether an accident occurring at a social event arises out of or is in the course of employment: *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964), decided

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by our Supreme Court, and *Chilton v. School of Medicine*, 45 N.C. App. 13, 262 S.E.2d 347 (1980), decided by this Court.

In 1964, our Supreme Court stated in *Perry* as follows:

Where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does *not* arise out of the employment.

Perry, 262 N.C. at 275, 136 S.E.2d at 646 (emphasis added and citations omitted). Sixteen years later in 1980, we approved and adopted in *Chilton* a method of analysis for determining whether employee injuries incurred at employer-sponsored recreational and social activities arise out of and in the course of employment. Specifically, we enumerated from 1A Larson, *Workmen's Compensation Law* § 22.23, six factors to assist a court in making this determination:

- (1) Did the employer in fact sponsor the event?
- (2) To what extent was attendance really voluntary?
- (3) Was there some degree of encouragement to attend evidenced by such factors as:
 - a. taking a record of attendance;
 - b. paying for the time spent;
 - c. requiring the employee to work if he did not attend; or
 - d. maintaining a known custom of attending?
- (4) Did the employer finance the occasion to a substantial extent?
- (5) Did the employees regard it as an employment benefit to which they were entitled as of right?
- (6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

45 N.C. App. at 15, 262 S.E.2d at 348. More recently, in 2007, our Supreme Court in *Frost*, *supra*, stated that the factors we outlined in *Chilton*

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were consistent with its 1964 holding in *Perry*. The Supreme Court in *Frost*, however, stopped short of expressly adopting the *Chilton* factors because its analysis in *Perry* was sufficient to resolve the case before it; but the Supreme Court did state that the factors adopted by this Court in *Chilton* “may serve as helpful guideposts in this inquiry[.]” 361 N.C. at 186-87, 639 S.E.2d at 433-34.

In the present case, the Commission made some findings regarding the factors considered by the Supreme Court in *Perry* as well as many of the six *Chilton* factors, answering most in the negative. For instance, the Commission found that attendance at the holiday lunch was voluntary and no attendance was taken. Further, in its finding of fact 22, the Commission stated as follows:

22. The Commission finds that while Plaintiffs were traveling to the holiday lunch, they were doing so for their own benefit. Although Plaintiffs testified that they attended the holiday lunch because they felt it was important for the morale of the department, less than half of the employees attended the lunch, and the undersigned find that the benefit to the employer, if any, was *de minimus*.

Plaintiffs specifically challenge the conclusion contained in finding of fact 22 that the holiday lunch was for the benefit of the employees and that the only benefit to the employer was *de minimus* at best. We believe, however, that this conclusion is supported by the Commission’s findings and the evidence. Specifically, the sixth factor in *Chilton* states that for a social event to be considered a benefit to the employer in the context of determining whether an injury at the event is covered by the Workers’ Compensation Act, the benefit must not be “merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards[.]” *Chilton*, 45 N.C. App. at 15, 262 S.E.2d at 350. It is undisputed that at least three SHP supervisors gave brief remarks before and during the lunch thanking employees for their dedication, but there was testimony that these remarks did not rise to the level of a speech. Also, no awards were handed out at the holiday lunch and attendees paid for their own meals.^{1 2} These findings answering some of the *Chilton* factor

1. Plaintiffs argue that Finding of Fact 26, which states that “[t]he injuries sustained by Plaintiffs on December 16, 2010 occurred during a meal break that Plaintiffs were free to use as they pleased” is not supported by the evidence because they were paid for their attendance, the holiday lunch lasted longer than their normal 30-minute paid lunch break, and they were not otherwise allowed to spend more than 30 minutes for a lunch break that day “as they pleased.” We agree that the evidence conclusively establishes that Plaintiffs

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questions establish that the holiday lunch did not arise out of or in the course of Plaintiffs' employment.

Further, we believe that the holiday lunch is similar to the type of event that is described in *Perry*, quoted above, which the Supreme Court stated would not arise out of the employment. Specifically, here, though the holiday lunch was not provided at Defendant's expense, Defendant did provide "an occasion" for the employees to participate in "an outing" which "was a matter of good will" in that, as the Commission determined, it was for the benefit of the employees and not Defendant. *Perry*, 262 N.C. at 275, 136 S.E.2d at 646. However, we note that Plaintiffs were not injured *at* the social event but while *traveling back* to the workplace. Neither party cites to any case where an employee was injured while traveling between their workplace and a social event occurring during the workday.

In North Carolina, the general rule is that "[i]njuries received by an employee while traveling to or from his place of employment are usually not covered by the [Workers' Compensation] Act unless the employer furnishes the means of transportation as an incident of the contract of employment" or if such injuries are sustained while the employee is "on premises owned or controlled by the employer[.]" *Strickland v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977). This general rule has been referred to as the "coming and going" rule by our Supreme Court. *See, e.g., Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). Our Courts have explained that "the question of *arising out of* is not satisfied . . . where the injury is due to the hazards of the public highway – risks common to the general public." *Harless v. Flynn*, 1 N.C. App. 448, 458, 162 S.E.2d 47, 54 (1968) (emphasis in original). *See Roberts v. Burlington Industries*, 321 N.C. 350, 358, 364 S.E.2d 417, 422-23 (1988); *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 401, 637 S.E.2d 251, 257 (2006), *disc. review denied*, 361 N.C. 356, 644 S.E.2d 232 (2007).

were not free to spend *more than 30 minutes* on the day of 16 December 2010 for a lunch break any way they pleased. Notwithstanding, we believe that the fact that SHP employees attending the holiday lunch were compensated for the long lunch break further supports the conclusion that the lunch was for the benefit of the employees. *See Smith v. Decotah Cotton Mills*, 31 N.C. App. 687, 690, 230 S.E.2d 772, 774 (1976) (stating that "[t]he fact that plaintiff was being paid during the break is not sufficient to cause [an] accident to arise out of her employment").

2. Plaintiffs also challenge finding of fact 23 that "Plaintiffs exposure to the risk of highway travel is a risk to which the general public is equally exposed," arguing that this finding is a conclusion of law. In either case, we address this issue of causation below in this opinion.

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The “going and coming” rule, however, is subject to a number of exceptions. For instance, there is “the ‘traveling salesman’ exception, the ‘contractual duty’ exception, the ‘special errand’ exception, and the ‘dual purpose’ exception.” *Dunn v. Marconi*, 161 N.C. App. 606, 611, 589 S.E.2d 150, 154 (2003).

The “traveling salesman” exception applies where an employee’s “work entails travel away from the employer’s premises [and does not involve] . . . a distinct departure [to make] . . . a personal errand.” *Id.* at 612, 589 S.E.2d at 155 (citation omitted). The “special errand” exception applies where the employee is “engaged in a special duty or errand for his employer.” *Id.* (citation omitted). The “contractual duty” exception applies where “the employer furnishes the means of transportation *as an incident of the contract of employment.*” *Id.* (citation omitted and emphasis added). However, this “contractual duty” exception does not generally apply where the transportation is “provided permissively, gratuitously, or as an accommodation[.]” *Hunt v. Tender Loving Care*, 153 N.C. App. 266, 270, 569 S.E.2d 675, 679 (citation omitted), *disc. rev. denied*, 356 N.C. 436, 572 S.E.2d 784 (2002). The “dual purpose” exception applies in certain circumstances where a trip serves “both business and personal purposes” and where it involves a “service to be performed for the employer [that] would have caused the journey to be made by someone even if it had not coincided with the employee’s personal journey.” *Dunn*, 161 N.C. App. at 612-13, 589 S.E.2d at 155 (citation omitted).

In the present case, the fact that Plaintiffs were riding in an automobile provided by SHP does not bring the accident within the “contractual duty” exception since the transportation to the holiday lunch was not “an incident of the contract of” their employment but, as found by the Commission, was provided as an accommodation, as testified by SHP employee Sergeant Taylor. *See Hunt, supra*. None of the other exceptions neatly fit the present situation since Plaintiffs were not traveling to perform work for their employer but were attending a social event.

Plaintiffs argue that the “coming and going” rule does not apply because “[i]n selecting the location and date of the holiday lunch, [D]efendant increased [P]laintiffs’ risk of having a motor vehicle accident as they did[.]” noting that the location was a 20-30 minute drive from the workplace and that SHP employees would not ever travel such a distance during their lunch break since they only receive 30 minutes for lunch. Essentially, Plaintiffs are arguing that the accident arose out of their employment under the “increased risk” analysis that has been applied by our Supreme Court. *See Roberts v. Burlington Industries*,

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321 N.C. 350, 358, 364 S.E.2d 417, 422-23 (1988). Our Supreme Court in *Roberts* described the “increased risk” approach as follows:

Under [an “increased risk analysis], the injury arises out of the employment if a risk to which the employee was exposed because of the nature of the employment was a contributing proximate cause of the injury, and one to which the employee would not have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood.”

Id. (citations, brackets, and quotation marks omitted). We believe, however, that the “increased risk” analysis does not apply where an employee voluntarily attends a social event which, itself, does not arise out of his employment and is injured due to a risk that is common to the public while traveling on a public road to that event. Therefore, this argument is overruled.

We believe that the Commission’s consideration of *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964), and *Chilton v. School of Medicine*, 45 N.C. App. 13, 262 S.E.2d 347 (1980) was appropriate as it first established that the social event itself did not arise out of or in the course of Plaintiffs’ employment. Further, the application of the “going and coming” rule shows that Plaintiffs’ injuries were not covered under the Workers’ Compensation Act where they were the result of an accident caused by a risk that is common to the public occurring while they were traveling on a public road while returning to their workplace from that social event.

For the reasons stated above, we hold that the Commission’s conclusion that Plaintiffs failed to meet their burden of proving that the accident causing their injuries arose out of and occurred in the course of their employment is supported by the Commission’s findings; and, accordingly, the opinion and award of the Commission is affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge STEELMAN concur.

IN THE COURT OF APPEALS

IN RE APPEAL OF VILLAS AT PEACEHAVEN, LLC

[235 N.C. App. 46 (2014)]

IN THE MATTER OF APPEAL OF

VILLAS AT PEACEHAVEN, LLC FROM THE DECISIONS OF THE FORSYTH COUNTY BOARD OF EQUALIZATION
AND REVIEW CONCERNING THE VALUATIONS OF CERTAIN REAL PROPERTY FOR TAX YEAR 2009

No. COA13-1224

Filed 15 July 2014

Taxation—property tax valuation—assessment—presumption of correctness

The taxpayer presented sufficient evidence to rebut the presumption that a property tax assessment was correct and the North Carolina Property Tax Commission erred in dismissing the taxpayer's appeal. Given that the burden on the aggrieved taxpayer was one of production and not persuasion, the taxpayer produced competent, material, and substantial evidence that the assessor's valuation was arbitrary or illegal and substantially exceeded the true value of the property.

Appeal by taxpayer from final decision entered 16 May 2013 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 5 March 2014.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by S. Leigh Rodenbough, IV, Robert W. Saunders, and Craig D. Schauer, for taxpayer-appellant.

Assistant County Attorney B. Gordon Watkins, III, for Forsyth County.

McCULLOUGH, Judge.

Villas at Peacehaven, LLC, (“taxpayer”) appeals from the Final Decision of the North Carolina Property Tax Commission (the “Commission”) dismissing its appeal from the decision of the Forsyth County Board of Equalization and Review (the “Board”). For the following reasons, we reverse.

I. Background

This case concerns the revaluation of property in Winston-Salem that taxpayer owns and operates as a rental community known as Villas at Peacehaven. The property at issue is comprised of 121 adjacent tax parcels spanning approximately 25 acres. Of the 121 separate tax

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parcels, 120 are residential lots, each improved with a detached single-family residence. The remaining lot is improved with a clubhouse and amenities for tenants, including a pool and a tennis court.

During the revaluation, effective as of 1 January 2009, a Forsyth County Tax Assessor (“the Assessor”) determined the aggregate value of all 121 lots to be \$16,945,800.¹ Taxpayer appealed the Assessor’s valuation to the Board, which heard taxpayer’s appeal on 10 December 2009 and notified taxpayer in writing of its decision to affirm the Assessor’s valuation on 15 December 2009. Taxpayer then initiated an appeal of the Board’s decision by submitting an Application For Hearing to the Commission on 12 February 2010. The Commission held a final pre-hearing conference on 31 August 2012 and filed an Order On Final Pre-hearing Conference on 4 September 2012. On 13 September 2012, taxpayer’s appeal came on for hearing before the Commission, sitting as the State Board of Equalization and Review.

At the hearing, taxpayer framed the issue as follows: “[W]hether or not separately platted lots with single-family residential homes constructed on them that are held by a common owner and have continuously been owned, operated, financed and managed as a single, income-producing rental property should be assessed as an income-producing property and assessed using the direct capitalization approach” Taxpayer then referred to the approach as an income approach as a unified whole rather than on an individual basis and argued for its use. Taxpayer further contended the method of valuation employed by the Assessor, in which the Assessor determined the value of each parcel separately on a cost basis using the County’s schedule of values and totaled the values assigned to each parcel to reach the aggregate value, was an arbitrary and illegal method of valuation that resulted in value far in excess of the true value of the property. In support of its argument, taxpayer relied on a South Carolina Supreme Court case and the testimony of two witnesses, its managing member, and an appraiser who performed a valuation of the property using the income approach.

At the close of taxpayer’s evidence, the County moved to dismiss taxpayer’s appeal on the ground that taxpayer failed to carry its burden of production. Upon considering both sides’ arguments, the Commission granted the County’s motion in open court. A Final Decision was later entered on 16 May 2013.

Taxpayer filed Notice of Appeal and Exceptions from the Final Decision on 13 June 2013.

1. The County later stipulated to a reduced value of \$16,647,200.

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II. Standard of Review

This Court's standard of review of a decision by the Commission is governed by statute. When reviewing a decision of the Commission:

the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or
- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2013). "In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105-345.2(c).

The "whole record" test does not allow the reviewing court to replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the [Commission's] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

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In re Parkdale Mills, __ N.C. App. __, __, 741 S.E.2d 416, 419 (2013) (citation omitted).

III. Discussion

“It is . . . a sound and a fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct.” *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). Yet, “the presumption is only one of fact and is therefore rebuttable.” *Id.* at 563, 215 S.E.2d at 762.

[I]n order for the taxpayer to rebut the presumption he must produce competent, material and substantial evidence that tends to show that: (1) [e]ither the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high*.

Id. (quotation marks and citations omitted) (emphasis in original). “In attempting to rebut the presumption of correctness, the burden upon the aggrieved taxpayer ‘is one of production and not persuasion.’” *In re Blue Ridge Mall LLC*, 214 N.C. App. 263, 267, 713 S.E.2d 779, 782 (2011) (quoting *In re IBM Credit Corp.*, 186 N.C. App. 223, 226, 650 S.E.2d 828, 830 (2007), *aff’d. per curiam*, 362 N.C. 228, 657 S.E.2d 355 (2008)).

[If] the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values. The critical inquiry in such instances is whether the County’s appraisal methodology “is the proper means or methodology given the characteristics of the property under appraisal to produce a true value or fair market value.” To determine the appropriate appraisal methodology under the given circumstances, the Commission must “‘hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden.’”

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In re Parkdale Mills, __ N.C. App. at __, 741 S.E.2d at 420 (citations omitted).

In the present case, the Commission granted the County's motion to dismiss taxpayers' appeal "for failure of [taxpayer] to rebut the initial presumption of correctness as to the county's tax assessments" Specifically, the Commission found the following:

15. In this appeal, Appellant argued that Forsyth County overvalued the units because it used an arbitrary method to value the property by not estimating a value for all of the parcels taken as a whole. When granting Forsyth County's motion to dismiss at the conclusion of Appellant's evidence, the Commission determines that Forsyth County did not use an arbitrary method to value the subject individual parcels when our Supreme Court has noted that "[a]n act is arbitrary when it is done without adequate determining principle." *In re Hous. Auth. Of City of Salisbury, Project NC 16-2*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952). When Appellant did not provide competent, material, and substantial evidence as to the individual values of all the parcels, then there was no evidence tending to show that the Forsyth County Assessor used an arbitrary method regarding his values for the subject parcels when his values were determined during the revaluation process and were not substantially higher than the values called for by the statutory formula.

The Commission then issued the following pertinent conclusions:

3. Since Appellant failed to rebut the presumptive validity of the County's individual assessments of the subject residential parcels, then the burden did not shift back to the County and no further analysis is necessary as to the County's appraisal methodology (i.e. the county is not required to demonstrate that its method produce[d] true values).
4. For that reason, the Commission granted Forsyth County's motion to dismiss this appeal at the conclusion of Appellant's evidence; by ruling that Appellant failed to rebut the presumptive validity of the County's individual assessments of the subject residential parcels. When granting Forsyth County's motion to

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dismiss, no further analysis was necessary as to the County's appraisal methodology (i.e. the Commission was not required to "hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inference, and to appraise conflicting and circumstantial evidence, all in order to determine whether the County met its burden.")

Now on appeal, taxpayer argues the Commission erred in dismissing its appeal because it presented sufficient evidence to rebut the presumption of correctness. We agree.

North Carolina's uniform appraisal standards provide the following:

All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283 (2013). Thus, this Court has recognized that "[a]n important factor in determining the property's market value is its highest and best use." *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 473, 458 S.E.2d 921, 923 (1995), *aff'd per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996).

At the hearing before the Commission, taxpayer first called its managing member, Mr. Barry Siegal, to testify. Siegal testified concerning the nature of the property and how it was purchased and developed with the intent that it be a rental complex. Siegal further testified about how the property was managed as a rental complex with taxpayer responsible for the maintenance of the interior and exterior of the residences, common areas, and amenities.

Following Siegal's testimony, taxpayer called Mr. Dick Foster, who the County stipulated was an expert in appraisal, as a witness. Foster testified that he determined the income approach was the most appropriate valuation approach to employ in this case. Foster testified that this determination was based on the use of property as a rental complex, which Foster found to be the highest and best use given the history

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of taxpayer's economic success with the property. Foster further stated that "[he] thought the income approach was basically the best way to go because it was an investment-grade property, and the value of it is dictated about [sic] how much income you bring in." After explaining why he believed the income approach was the most appropriate valuation approach, Foster described how he employed the income approach to calculate the value of the property. Foster then testified that his application of the income approach produced a value of \$10,905,000 for the property.

Despite the testimony elicited by taxpayer supporting use of the income approach, the County contends taxpayer did not produce sufficient evidence that the method employed by the Assessor was arbitrary or illegal. Yet, this Court has explained that:

[a]n illegal appraisal method is one which will not result in "true value" as that term is used in [N.C.G.S.] § [105–]283. Since [a]n illegal appraisal method is one which will not result in true value as that term is used in [N.C.G.S. § 105–283], it follows that such method is also arbitrary.

In re Blue Ridge Mall LLC, 214 N.C. App. at 269, 713 S.E.2d at 784 (quotation marks and citations omitted).

Keeping in mind the burden on the aggrieved taxpayer is one of production and not persuasion, *see Id.* at 267, 713 S.E.2d at 782, we hold the taxpayer produced competent, material, and substantial evidence tending to show that the Assessor's valuation was arbitrary or illegal and substantially exceeded the true value of the property.

Although we determine taxpayer rebutted the presumption of correctness, we take no position on the proper valuation method in this case and explicitly decline taxpayer's invitation to provide guidance to the Commission. We determine only that taxpayer produced sufficient evidence to rebut the presumption of correctness afforded ad valorem tax assessments. Because the Commission held otherwise and dismissed taxpayer's appeal, we reverse the Commission's Final Decision and remand the case for the Commission to determine the appropriate valuation method. Whether it is necessary for the Commission to hear evidence beyond that already elicited from taxpayer's witnesses during direct- and cross-examinations is for the Commission to decide. We simply hold taxpayer produced sufficient evidence to require the Commission to address the valuation issue raised by taxpayer.

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IV. Conclusion

For the reasons discussed above, we reverse the Final Decision of the Commission and remand for further proceedings.

Reversed and remanded.

Judges HUNTER, Robert C. and GEER concur.

IN THE MATTER OF THE ESTATE OF PETER HEIMAN

No. COA13-1339

Filed 15 July 2014

Wills—elective share rights—waiver—fair and reasonable disclosure of property

The superior court erred in a wills case by concluding that an agreement between decedent's daughter (and executrix of the estate) and wife was not an enforceable waiver of the wife's elective share rights. Decedent's wife was provided fair and reasonable disclosure of the property and obligations of decedent's estate. The existence of a lawsuit filed by the estate against Fidelity was not material because it had no relevance to the calculation of the share of the decedent's total net assets to which decedent's wife was entitled.

Appeal by Executrix from Order entered 28 June 2013 by Judge Robert H. Hobgood in Superior Court, Orange County. Heard in the Court of Appeals 10 April 2014.

Richard Bircher and Russell J. Hollers III, for petitioner-appellee.

Levine & Stewart, by James E. Tanner III, for respondent-appellant.

STROUD, Judge.

Heidi Venier, executrix of Peter Heiman's estate, appeals from an order entered 28 June 2013 by the superior court affirming an order of the Orange County Clerk of Superior Court and concluding that Audrey Layden, Mr. Heiman's wife, was entitled to an elective share of \$25,970.35 from the estate. We reverse.

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I. Background

Peter Heiman (“decedent”) passed away on 7 July 2009. Prior to his death, he had executed a will naming Heidi Venier, his only child, the sole beneficiary and executrix of his estate. Mr. Heiman was survived by his wife, Ms. Layden, and Ms. Venier, his daughter from a prior marriage. Ms. Venier applied for and received letters testamentary on 3 August 2009. As the surviving spouse, Ms. Layden petitioned for a year’s allowance of \$10,000 and an elective share of Mr. Heiman’s assets.

On 20 October 2009, Ms. Venier, as executrix, filed a complaint for declaratory judgment against Fidelity Investments. She sought to have the estate designated as beneficiary for two accounts, an individual retirement account (IRA) and another investment account. Mr. Heiman had designated as beneficiary for these accounts a trust which was mentioned in a previously revoked will but never created.¹ On or about 1 December 2009, Ms. Venier filed an inventory for decedent’s estate. The inventory listed \$377,795.45 in total assets. That amount included the IRA, which was valued at \$38,908.99.

Before Ms. Layden’s petition for elective share was heard by the Clerk of Superior Court, the parties voluntarily attended mediation in an effort to resolve the matter and entered into a settlement agreement, executed by Ms. Layden on 18 May 2010 and by Ms. Venier, as executrix, on 19 May 2010. The agreement stated that in consideration for the payment of \$65,000 from the assets owned by decedent, “the parties accept full compromise, settlement and satisfaction of, and the final release and discharge of all actions, claims and demands whatsoever that each party may have against the other” Under the agreement, both parties released any claims against the other and the estate agreed that Fidelity Investments would distribute the IRA, then worth approximately \$40,000.00, directly to Ms. Layden, and that she would receive approximately \$25,000.00 from another Fidelity account.

After the agreement was signed, Ms. Venier dismissed her declaratory judgment action against Fidelity. But Ms. Layden refused to dismiss her petition for an elective share. She argued that “the alleged ‘settlement’ was procured by a material misrepresentation in the estate file.” On 9 August 2012, the Orange County Clerk of Superior Court noticed

1. According to the brief filed by the Estate in the appeal to the superior court, due to the “the lapse of the Heiman Trust as the designated beneficiary,” the “default beneficiary designation” for the IRA was the surviving spouse, Ms. Layden. We are unable to discern from the record how or why the “default beneficiary” of the IRA was not included as a party to the declaratory judgment action regarding disposition of the IRA, but she was not.

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his intent to rule on the elective share petition and heard the case on 4 December 2012.

The Clerk found that the existence of the Fidelity declaratory judgment lawsuit was not disclosed to Ms. Layden. He therefore concluded that the settlement agreement was unenforceable as a waiver of Ms. Layden's elective share rights. The Clerk found that the total net assets of decedent were valued at \$363,851.50. It concluded that Ms. Layden was entitled to a one-quarter share, \$90,962.88. It further found that Ms. Layden had already been paid \$64,947.62 (the amount she had already received under the settlement agreement). It therefore awarded \$25,970.35 to Ms. Layden.

Ms. Venier appealed to the superior court on 27 December 2012. By order entered 28 June 2013, the superior court fully adopted the findings of fact made by the Clerk of Superior Court and affirmed the order. Ms. Venier filed written notice of appeal to this Court on 24 July 2013.

II. Standard of Review

Ms. Venier appeals from the superior court's order affirming the Clerk's order regarding Ms. Layden's elective share petition. The superior court fully adopted the clerk's findings of fact. Ms. Venier does not contest any of these findings on appeal. She only challenges the trial court's conclusion that Ms. Layden was not provided fair and reasonable disclosure of the property and obligations of decedent and that the settlement agreement was therefore unenforceable.

Thus, the only issue on appeal is one of law, which we review *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re Estate of Pope*, 192 N.C. App. 321, 331, 666 S.E.2d 140, 148 (2008) (citation, quotation marks, and brackets omitted), *disc. rev. denied*, 363 N.C. 126, 673 S.E.2d 129 (2009).

III. Full and Fair Disclosure

The issue for us to consider is a narrow one, but one of first impression in North Carolina: what does it mean for a surviving spouse to be "provided a fair and reasonable disclosure of the property and financial obligations of the decedent" for purposes of waiver under N.C. Gen. Stat. § 30-3.6 (b)(2) (2009)?

Ms. Layden urges us to consider the required disclosure in light of the fiduciary duty she contends that Ms. Venier owed her as executrix

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of the decedent's estate. Ms. Venier denies that she owed Ms. Layden any such duty because Ms. Venier is a surviving spouse who has filed a claim for an elective share, not a beneficiary under the will. We need not decide this issue because even assuming that Ms. Venier owed Ms. Layden a fiduciary duty, the existence of the Fidelity lawsuit was not a material fact and failure to disclose it was not a breach of any duty owed—fiduciary or statutory.

A. Elective Share Statutes

The elective share statutes are quite detailed and the calculation of an elective share is highly fact-dependent. In deciding what information Ms. Layden was required to disclose, it is necessary to understand the context. Therefore, before addressing the issue of waiver, we will lay out the calculation of elective share as applicable to this case.

Under N.C. Gen. Stat. § 30-3.1, *et seq.*, a wife who survives her husband² may choose to take an “elective share” of the decedent's assets rather than taking under the decedent's will. The “applicable share” of the decedent's assets to which a surviving spouse is entitled depends on whether the decedent had a prior spouse and whether the decedent is survived by children or other lineal descendants. N.C. Gen. Stat. § 30-3.1(a) (2009). A second or successive spouse of a decedent survived by one or more lineal descendants is entitled to a reduced share. N.C. Gen. Stat. § 30-3.1(b). Where the decedent is survived by a second spouse and one child, the applicable share is one-quarter of the decedent's total net assets. *See id.*

The term “total net assets” is defined by N.C. Gen. Stat. § 30-3.2(4) (2009) as the decedent's total assets reduced by any year's allowances “to persons other than the surviving spouse and claims.” “Total assets” is in turn defined as the sum of the values listed in N.C. Gen. Stat. § 30-3.2(3f), which includes *inter alia* “[b]enefits payable by reason of the decedent's death under any policy, plan contract, or other arrangement.” N.C. Gen. Stat. § 30-3.2(3f)(d). Such benefits include “[i]ndividual retirement accounts.” N.C. Gen. Stat. § 30-3.2(3f)(d)(5).

The surviving spouse is entitled to her share of the total net assets reduced by the value of the net property passing to the surviving spouse. N.C. Gen. Stat. § 30-3.1(a). The “net property passing to the surviving spouse” includes any property that passes by “beneficiary designation” (except federal social security) reduced by the amount of any death taxes or claims payable out of such assets. N.C. Gen. Stat. § 30-3.2(2c),(3c)(a).

2. Or vice-versa.

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Taking these statutes as a whole, if the decedent owns an individual retirement account at the time of his death, it is included in the decedent's total net assets for purposes of calculation of the elective share. If someone other than the surviving spouse is the IRA beneficiary, then the elective share to which the surviving spouse is entitled will be her share of the total net assets—including the IRA—without any reduction in value. If, however, an individual retirement account owned by the decedent passes by beneficiary designation to the surviving spouse, her elective share will be reduced by the value of the IRA. In either case, the total value of the decedent's assets to which a surviving spouse is entitled is simply the applicable share of the total net assets of the decedent.

A surviving spouse entitled to an elective share may waive her right in writing. N.C. Gen. Stat. § 30-3.6(a). However, “[a] waiver is not enforceable if the surviving spouse proves that: (1) The waiver was not executed voluntarily; or (2) The surviving spouse or the surviving spouse's representative making the waiver was not provided a fair and reasonable disclosure of the property and financial obligations of the decedent” N.C. Gen. Stat. § 30-3.6(b).

B. “Fair and Reasonable Disclosure”

Here, Ms. Layden does not truly argue that the settlement agreement was not a waiver of her elective share rights nor that the waiver was involuntary. Indeed, it is clear that the agreement was intended by all parties to fully settle Ms. Layden's elective share claim. The agreement between Ms. Venier, as executrix of the Heiman Estate, and Ms. Layden stated that it was intended to be the “final release and discharge of all actions, claims and demands whatsoever that each party may have against the other.” Such “claims and demands” include Ms. Layden's claim for elective share.

Nevertheless, Ms. Layden contends that the agreement is unenforceable because Ms. Venier failed to provide “fair and reasonable disclosure” of decedent's assets under N.C. Gen. Stat. § 30-3.6(b). Ms. Layden further asserts that she relied, to her detriment, on the “misrepresentations” of Ms. Venier and that therefore the waiver was unenforceable as a contract induced by fraud. Specifically, she contends that Ms. Venier concealed the existence of the estate's lawsuit against Fidelity. Regardless of whether the issue is considered as a matter of common law fraud or statutory application, if the fact Ms. Venier failed to disclose was immaterial, then the agreement would remain enforceable. See *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 (“A cause of action for fraud [may be] based on . . . a failure to disclose a

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material fact relating to a transaction which the parties had a duty to disclose.” (citations omitted) (emphasis added)), *disc. rev. denied*, 317 N.C. 703, 347 S.E.2d 41 (1986).

“A fact is material[] if[,] had it been known to the party, would have influenced that party’s decision in making the contract at all.” *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 176-77, 684 S.E.2d 41, 53 (2009). As in any other settlement negotiation, the material facts are those that allow the party to calculate her best alternative to a negotiated agreement and to understand the effect of the agreement.

Ms. Layden had two alternatives: to proceed with her claim for elective share and receive the amount as ordered by the Clerk of Court, or to enter into a settlement agreement with the estate. If the surviving spouse knows what property decedent owned and what financial obligations were owed, she can accurately calculate the share to which she would be entitled absent a settlement. If the amount of the “total net assets” of the estate is known, it is a simple matter to calculate 25% of this amount, and this amount is what the surviving spouse would receive as her elective share by order of the Clerk; the total amount paid to the surviving spouse by the estate would also be reduced by any sums which passed to her by “beneficiary designation,” excluding the amount of any death taxes or claims payable out of such assets. N.C. Gen. Stat. § 30-3.2(2c),(3c)(a).³ But whether the funds are paid to the surviving spouse entirely by the estate or partially by the estate and partially as a direct distribution to the surviving spouse as beneficiary of an account, the amount received by the surviving spouse would be the same.

Here, the existence of the lawsuit against Fidelity was not a material fact because it had no relevance to the calculation of the share of the decedent’s total net assets to which Ms. Layden would be entitled. Decedent owned an IRA valued at \$38,908.99. This asset was included in the total net assets owned by decedent, valued at \$379,796.54, and disclosed on the Inventory for Decedent’s Estate of 1 December 2009. The IRA was listed in the section of the Inventory for “Stocks and Bonds In the Sole Name of Decedent or Jointly Owned Without Right of Survivorship” and was identified as a “Fidelity Traditional IRA” with the correct account number listed and the value stated as \$38,908.99. The only difference in the Inventory, had the IRA been listed correctly, would be that it would have been listed under Part II of the form, instead of Part

3. Ms. Layden does not contend, and the record does not reflect, any “death taxes or claims payable out of” the IRA assets, so for our purposes the only relevant number is the total value of the IRA which passed to Ms. Layden.

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I, as “Stocks/Bonds/Securities Jointly Owned With Right Of Survivorship or registered in beneficiary form and automatically transferable on death.” The value, which was the only relevant information for purposes of calculating Ms. Layden’s elective share, would be the same.

Ms. Layden, as a second spouse to a decedent with one living child, was entitled to one quarter of decedent’s total net assets. This sum could easily be calculated at mediation based upon the values of the decedent’s property which had all been disclosed, although some expenses, such as the administrative costs, could only be estimated. Ultimately, the trial court found that there were \$15,945.04 in administrative costs and reduced the total net assets by that amount, resulting in total net assets of \$363,851.50. Ms. Layden was entitled to a one-quarter share, \$90,962.88. Ms. Layden could have calculated this amount based on the information provided to her by Ms. Venier.⁴

Even if the IRA had been distributed to Ms. Layden prior to the mediation, based upon her status as the default beneficiary, the total net assets would have still been the same and Ms. Layden would still be entitled to \$90,962.88 from those assets. But she would not be entitled to receive \$90,962.88 in addition to the full value of the IRA. Her elective share would be reduced by the value of the IRA, \$38,908.99, as the Clerk correctly determined. So, no matter which party is designated the beneficiary of the IRA, the total value of the assets to which Ms. Layden would have been entitled remains the same. Given the information provided, Ms. Layden fully knew the amount to which she would be entitled if she declined to settle the dispute. She settled it nonetheless.

Indeed, it may seem odd that Ms. Layden and Ms. Venier had such a heated dispute regarding the seemingly simple mathematical calculation of this elective share claim that nearly a year passed before it was resolved at mediation, an additional two years before being heard by the Clerk, and that this appeal would be before this Court nearly five years after the decedent’s death. The reasons are not apparent above because of the single legal issue presented on appeal, but before the Clerk and trial court, the reasons were clear. Essentially, tragic circumstances surrounded decedent’s death, and relations between Ms. Layden, as his second wife, and Ms. Venier, his daughter, were acrimonious. Because of these circumstances, Ms. Venier sought to prevent Ms. Layden from

4. In addition, Ms. Layden was fully aware, based upon documents filed in this matter, that Ms. Venier was seeking to have any rights that she may have related to her marriage to decedent eliminated on a theory of equitable estoppel.

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claiming an elective share. Decedent and Ms. Layden had been in the process of negotiating a separation agreement when he died.

Before the trial court, Ms. Venier summarized her argument as follows:

As a matter of fundamental fairness, Mr. Heiman and Ms. Layden had a deal; the terms were certain, both of them were acting in accordance with these terms, and for all intents and purposes the deal was complete but for their signatures and the subsequent payment of a modest sum of money. Beyond its sheer gall and hypocrisy, it is not merely wrong, it's a travesty that Ms. Layden should lay claim to a quarter of Mr. Heiman's estate on the basis of a short, late in life, unhappy marriage that ended in separation and suicide, when she had already agreed to waive any claim to the estate. The Court must not allow such an injustice to occur.

Although Ms. Venier's attempts to avoid the elective share were unsuccessful and she does not challenge Ms. Layden's entitlement to an elective share on appeal, there were other disputed issues existing at the time of the mediation. In fact, the value of the decedent's estate may have been the only undisputed issue in the settlement negotiations. Viewed in this light, Ms. Layden's agreement to settle the elective share claim for a bit less than the full amount of the statutory share—where the value of the total net estate was known—is quite reasonable.

The Fidelity lawsuit, as discussed above, solely concerned the proper beneficiary of the account. It did not affect the ownership of the account or its value—it was owned by the decedent at his death and that fact is undisputed. It had no bearing on the calculation of the share to which Ms. Layden was entitled, so we see no reason that disclosure of that fact would have affected in any way Ms. Layden's decision to settle. Ms. Layden has not claimed that any other material fact had been concealed. Moreover, Ms. Venier, as executrix, fully performed her part of the negotiated agreement, allowing two of the Fidelity accounts to pass to Ms. Layden. Ms. Layden, by contrast, failed to perform her contractual duties by refusing to dismiss her elective share petition.

Given the immateriality of the Fidelity lawsuit to the calculation of an elective share, we conclude that Ms. Venier fully and fairly disclosed all material information to Ms. Layden. Ms. Layden was fully aware of all of the decedent's assets and liabilities when she decided to waive her

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right to an elective share and to enter into the settlement agreement. The settlement agreement constituted a knowing and voluntary waiver of Ms. Layden's elective share rights. We therefore hold that the superior court erred in concluding that the settlement agreement was not an enforceable waiver of Ms. Venier's right to an elective share. We reverse the trial court's order affirming that of the Clerk of Superior Court.

IV. Conclusion

For the foregoing reasons, we conclude that the existence of the Fidelity lawsuit was not a material fact. Therefore, Ms. Venier's failure to disclose its existence does not make the settlement agreement unenforceable. We hold that the superior court erred in concluding that the agreement was not an enforceable waiver of Ms. Layden's elective share rights. We therefore reverse its order affirming the order entered by the Clerk of Superior Court.

REVERSED.

Judges HUNTER, JR., Robert N. and DILLON concur.

IN THE MATTER OF APPEAL OF DIXIE BUILDING, LLC FROM THE DECISION OF THE
GUILFORD COUNTY BOARD OF EQUALIZATION AND REVIEW

No. COA13-1170

Filed 15 July 2014

Taxation—property tax—revaluation—appeal—timeliness

The Property Tax Commission properly concluded that Dixie Building's appeal of the revaluation of its properties was untimely. Although Dixie Building contended on appeal that it was permitted under N.C.G.S. § 105-322 to submit its appeal to the Guilford County Board at any time prior to the Board's adjournment for the year, Dixie Building's construction of the statute would place various subsections of the statute in conflict with each other. Reading the statute as a whole and in a manner that gave each provision meaning, the legislature intended to allow boards of equalization and review to set deadlines for the filing of hearing requests. Dixie Building failed to comply with the Guilford County deadline.

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Appeal by appellant from order entered 28 June 2013 by the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 19 February 2014.

Tuggle Duggins, P.A., by Michael S. Fox, J. Nathan Duggins III, Martha R. Sacrinty, and Sarah J. Hayward, for appellant Dixie Building, LLC.

Guilford County Attorney J. Mark Payne and Deputy County Attorney Matthew J. Turcola, for appellee Guilford County.

GEER, Judge.

Dixie Building, LLC appeals from an order entered by the North Carolina Property Tax Commission (“the Commission”) dismissing Dixie Building’s appeal from the Guilford County Board of Equalization and Review (“the Guilford County Board”) on the grounds that Dixie Building’s original request to the Guilford County Board for a hearing was untimely. Although Dixie Building contends that it was permitted, under N.C. Gen. Stat. § 105-322 (2013), to submit its appeal to the Guilford County Board at any time prior to the Board’s adjournment for the year, Dixie Building’s construction of the statute would place various subsections of the statute in conflict with each other.

Reading the statute as a whole and in a manner that gives each provision meaning leads to the conclusion that the legislature intended to allow boards of equalization and review to set deadlines for the filing of hearing requests. Because Dixie Building failed to comply with the Guilford County deadline, the Commission properly concluded that Dixie Building’s appeal was untimely. We, therefore, affirm.

Facts

Dixie Building owns real property in Guilford County. In 2012, Guilford County performed a revaluation of all property within its boundaries as it was required to do pursuant to N.C. Gen. Stat. § 105-286(a)(1) (2013). The Guilford County Board established a deadline of 2 July 2012 for appealing revaluations and assessments for the 2012 year.

Following the 2012 revaluation, Dixie Building disputed the resulting appraisal values of six properties (“the Dixie properties”). However, Dixie Building did not appeal the revaluations of the Dixie properties by the 2 July 2012 deadline. Instead, almost five months later, on

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30 November 2012, Dixie Building filed a written notice with the Guilford County Board formally requesting an appeal of the 2012 revaluations of the Dixie properties. In addition, counsel for Dixie Building, while representing other clients with revaluation appeals, attended a Guilford County Board meeting on 16 January 2013. During that meeting, Dixie Building's counsel made an oral request for the Guilford County Board to review the 2012 revaluations of the Dixie properties.

On 22 January 2013, the Guilford County Board notified Dixie Building in writing that it was denying Dixie Building's request to challenge the 2012 reappraisal values on the grounds that its appeal "was not timely." Dixie Building timely appealed that denial to the Commission on 18 February 2013. On 28 June 2013, the Commission entered an order granting Guilford County's motion to dismiss on the grounds that the appeal to the Guilford County Board was in fact untimely. Dixie Building has timely appealed the Commission's order to this Court.

Discussion

In an appeal from the Commission, "[q]uestions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Appeal of the Greens of Pine Glen Ltd. P'Ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Dixie Building contends on appeal that the Commission erred in construing the pertinent statutes when it concluded that Dixie Building's appeal to the Guilford County Board was untimely.

Questions of statutory interpretation, such as Dixie Building poses, "are questions of law[.] . . . The primary objective of statutory interpretation is to give effect to the intent of the legislature." *First Bank v. S & R Grandview, L.L.C.*, ___ N.C. App. ___, ___, 755 S.E.2d 393, 394 (2014). In construing a statute, "[t]he plain language of a statute is the primary indicator of legislative intent." *Id.* at ___, 755 S.E.2d at 394. However, when statutory language is ambiguous, "we are required to examine the entire statute to ascertain its meaning and to give force and effect to every part of it, reconciling, when reasonably possible, any seeming conflicts by comparing its sections and provisions with each other." *State Bd. of Agric. v. White Oak Buckle Drainage Dist.*, 177 N.C. 222, 226, 98 S.E. 597, 599 (1919).

Pursuant to N.C. Gen. Stat. § 105-286, each county is required to reappraise all real property every eight years. In years when a general reappraisal of real property has not been done, N.C. Gen. Stat. § 105-287 (2013) limits the circumstances under which the county may

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change the appraised value of real property. N.C. Gen. Stat. § 105-322(g) (1)c provides that the county board of equalization and review has a duty to review the tax lists and increase and decrease the appraised value of any property as appropriate, although “the board shall not change the appraised value of any real property from that at which it was appraised for the preceding year except in accordance with the terms of G.S. 105-286 and 105-287.”

N.C. Gen. Stat. § 105-322(e) sets out the provisions regarding when a board of equalization and review shall meet and regulates the starting date and the ending date for a board’s meetings:

Time of Meeting. – Each year the board of equalization and review shall hold its first meeting not earlier than the first Monday in April and not later than the first Monday in May. In years in which a county does not conduct a real property revaluation, the board shall complete its duties on or before the third Monday following its first meeting unless, in its opinion, a longer period of time is necessary or expedient to a proper execution of its responsibilities. Except as provided in subdivision (g)(5) of this section, the board may not sit later than July 1 except to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law. *In the year in which a county conducts a real property revaluation, the board shall complete its duties on or before December 1, except that it may sit after that date to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law.* From the time of its first meeting until its adjournment, the board shall meet at such times as it deems reasonably necessary to perform its statutory duties and to receive requests and hear the appeals of taxpayers under the provisions of subdivision (g)(2), below.

(Emphasis added.)

Our Supreme Court has explained that “[t]he reason why the Board of Equalization is required to act within a fixed time is apparent. The taxing authority must know the value of the taxable property before it can fix a rate sufficient to meet governmental needs.” *Spiers v. Davenport*, 263 N.C. 56, 59, 138 S.E.2d 762, 764 (1964). *See also* N.C. Gen. Stat.

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§ 105-347 (2013) (providing that county must set property tax rate “not later than the date prescribed by applicable law or, in the absence of specific statutory provisions, not later than the first day of August” so as to provide revenues “necessary to meet the general and other legally authorized expenses of the taxing units”); N.C. Gen. Stat. § 105-360(a) (2013) (providing that property taxes are due and payable on September 1 of fiscal year for which taxes are levied with interest accruing if taxes are paid on or after January 6).

N.C. Gen. Stat. § 105-322(g) sets out the powers and duties of a board of equalization and review, including the duty to review tax lists, the duty to hear taxpayer appeals, the power to appoint committees, the power to issue subpoenas, and the power to examine witnesses and documents. With respect to the duty to hear taxpayer appeals, N.C. Gen. Stat. § 105-322(g)(2) provides:

Duty to Hear Taxpayer Appeals. – On request, the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of the taxpayer’s property or the property of others.

- a. *A request for a hearing under this subdivision (g)(2) shall be made in writing to or by personal appearance before the board prior to its adjournment.* However, if the taxpayer requests review of a decision made by the board under the provisions of subdivision (g)(1), above, notice of which was mailed fewer than 15 days prior to the board’s adjournment, the request for a hearing thereon may be made within 15 days after the notice of the board’s decision was mailed.

(Emphasis added.)

In arguing that its request for a hearing before the Guilford County Board was timely, Dixie Building points to N.C. Gen. Stat. § 105-322(g) (2), asserting that it should be construed as providing that any request made prior to a board’s adjournment is timely. Dixie Building further contends that “the time prescribed by law” referenced in N.C. Gen. Stat. § 105-322(e) is defined by N.C. Gen. Stat. § 105-322(g)(2) as the date of the Guilford County Board’s adjournment for the year. Consequently, Dixie Building asserts, its request for a hearing, presented prior to the Guilford County Board’s adjournment, was timely. We disagree.

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The plain language of N.C. Gen. Stat. § 105-322(e) cannot be reconciled with Dixie Building's interpretation of the statute. In N.C. Gen. Stat. § 105-322(e), the General Assembly provided generally that "the board shall meet at such times as it deems reasonably necessary to perform its statutory duties *and to receive requests and hear the appeals of taxpayers* under the provisions of subdivision (g)(2), below." (Emphasis added.) However, the legislature also mandated that in years involving a real property revaluation, as occurred in 2012, "the board shall complete its duties on or before December 1" *Id.* The only exception is that the board "may sit after that date *to hear and determine requests* made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law." *Id.* (emphasis added).

Thus, the plain language of N.C. Gen. Stat. § 105-322(e) limits the board's authority after 1 December to only hearing and determining requests for review under N.C. Gen. Stat. § 105-322(g)(2). The General Assembly did not authorize a board of equalization and review to receive requests for hearings under subdivision (g)(2) after 1 December. Under N.C. Gen. Stat. § 105-322(e), the board may only receive requests prior to 1 December. However, N.C. Gen. Stat. § 105-322(e) adds a further limitation that hearings after 1 December may only be held for those requests "made within the time prescribed by law," suggesting that the deadline for requests could be a date other than 1 December.

N.C. Gen. Stat. § 105-322(g)(2)a, the subsection on which Dixie Building relies, can be read in a manner that is consistent with the plain language of N.C. Gen. Stat. § 105-322(e). The focus of N.C. Gen. Stat. § 105-322(g)(2)a is on how "[a] request for a hearing under this subdivision (g)(2) shall be made" The statute specifies that the hearing request may be made in two ways: in writing to the board or by a personal appearance before the board. The subsection, rather than granting the taxpayer the absolute right to make a request up until the board's adjournment for the year (a construction that would place § 105-322(g)(2)a in conflict with § 105-322(e)), can be read instead as providing an outside limit on when a board of equalization may allow requests for hearings to be made. The subsection establishes that the board has no authority to grant a hearing for a request made after adjournment.¹

Such a construction is also consistent with N.C. Gen. Stat. § 105-322(f), which requires a board to publish a notice of certain dates prior to the

1. N.C. Gen. Stat. § 105-322(g)(2)a includes an exception, not applicable here, when the board has made a decision under § 105-322(g)(1) and notice was sent out less than 15 days prior to the board's adjournment.

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board's first meeting for the year. In addition to announcing the date, hours, place, and purpose of the first meeting of the board, the notice must also "state the dates and hours on which the board will meet following its first meeting *and the date on which it expects to adjourn . . .*" *Id.* (emphasis added). If a board subsequently decides to adjourn at a later date than was originally announced, it must provide notice "published at least once in the newspaper in which the first notice was published, *such publication to be prior to the date first announced for adjournment.*" *Id.* (emphasis added).

The notice requirements of N.C. Gen. Stat. § 105-322(f) regarding adjournment can only be effective if a board has the authority to set deadlines prior to the time of adjournment for the submission of requests for a hearing. It would be difficult for a board to identify an adjournment date in advance that would allow adequate time to conduct hearings without setting a deadline for requests for hearings sufficiently in advance of the projected adjournment date. In addition, under Dixie Building's construction of N.C. Gen. Stat. § 105-322(g)(2)a, an aggrieved taxpayer could request a hearing on the scheduled date of adjournment, but that would require that the board then postpone adjourning until the hearing could be conducted. However, the board would then be unable to comply with the notice provision for adjournment set out in N.C. Gen. Stat. § 105-322(f).

Dixie Building nonetheless urges that a board could hear an appeal the same day it was requested, thus avoiding any deviation from the statute's notice requirements. N.C. Gen. Stat. § 105-322(g)(2)c, however, provides that "[u]pon the request of an appellant, the board shall subpoena witnesses or documents if there is a reasonable basis for believing that the witnesses have or the documents contain information pertinent to the decision of the appeal." In addition, the General Assembly has granted a board of equalization and review the power to "subpoena witnesses or documents on its own motion . . ." N.C. Gen. Stat. § 105-322(g)(3)b. A hearing occurring on the same day as a request for a hearing would preclude the board from exercising these powers.

Further, it is entirely plausible that if an announced adjournment date were the deadline for requests for hearing rather than the deadline set by a board, many taxpayers would wait until the last day to make their requests. An inability to conduct all the requested hearings in one meeting would then force a postponement of the adjournment date and violation of the notice provisions.

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We can see no basis for concluding that the General Assembly intended to strip a board of equalization and review of the power to set a reasonable schedule for receiving requests for a hearing that would ensure a full and careful consideration of a taxpayer's appeal. Indeed, N.C. Gen. Stat. § 105-322(e) mandates that "[f]rom the time of its first meeting until its adjournment, the board shall meet *at such times as it deems reasonably necessary* to perform its statutory duties and to receive requests and hear the appeals of taxpayers under the provisions of subdivision (g)(2), below." (Emphasis added.)

In short, Dixie Building's proposed construction of N.C. Gen. Stat. § 105-322(g)(2) to allow requests for hearing through the date of adjournment would place that subsection in conflict with numerous other subsections. When the statute is read as a whole giving effect to all of its provisions, we hold that the Guilford County Board and the Property Commission properly concluded that the legislature intended for a local board of equalization and review to have the authority to set a reasonable deadline prior to its adjournment for accepting requests for revaluation appeals and that such time is "the time prescribed by law" provided for in N.C. Gen. Stat. § 105-322(e). *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004) (holding that "this Court does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia*, giving effect, if possible, to every provision.").

Because 2012 was a revaluation year for Guilford County, the Guilford County Board set 2 July 2012 as the deadline for appeal requests for that year and because Dixie Building did not submit its hearing request by that date, Dixie Building did not timely request an appeal of the revaluation of the Dixie properties for the tax year 2012. The Commission, therefore, properly dismissed Dixie Building's revaluation appeal.

Affirmed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

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[235 N.C. App. 69 (2014)]

IN THE MATTER OF J.C. & J.C.

No. COA14-79

Filed 15 July 2014

1. Jurisdiction—subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—sufficiency of evidence

The trial court did not err in a child neglect case by allegedly failing to make adequate findings to establish its jurisdiction in light of a prior case in Kentucky. Although it would have been better for it to make more specific findings of fact to support its jurisdiction, the evidence was sufficient to support the trial court's assertion of jurisdiction pursuant to N.C.G.S. § 50A-201(a)(1).

2. Child Abuse, Dependency, and Neglect—neglect—findings of fact

The trial court did not err by adjudicating the juveniles neglected based on the evidence and the trial court's findings of fact.

3. Child Abuse, Dependency, and Neglect—dependency—clerical error

Although the Department of Social Services filed petitions alleging that the juveniles were both neglected and dependent, it only argued that they were neglected at the adjudication hearing. Thus, the trial court's checking of the box for dependency represented a clerical error.

4. Child Visitation—supervised visitation—costs—opportunity to present evidence—modification

The trial court did not err by ordering respondent mother to pay the costs of her supervised visitation. Respondent has ample opportunity to present evidence of her inability to pay the cost of supervised visitation and have the visitation plan modified, should the need arise.

Judge HUNTER, Robert N., concurring in part and dissenting in part.

Appeal by respondent mother from orders entered 15 and 22 October 2013 by Judge Resson Faircloth in Johnston County District Court. Heard in the Court of Appeals 16 June 2014.

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Holland & O'Connor, by Jennifer S. O'Connor, for petitioner-appellee Johnston County Department of Social Services.

Richard Croutharmel for respondent-appellant mother.

Marie H. Mobley for guardian ad litem.

ELMORE, Judge.

Respondent mother appeals from the trial court's orders adjudicating the juveniles neglected and dependent. Respondent contends that the trial court made insufficient findings to demonstrate it had obtained jurisdiction over the matter, made insufficient findings to support its order adjudicating the juveniles neglected and dependent, and improperly required respondent to pay the costs of her visitation. We affirm the adjudication of neglect and the disposition order, but remand for correction of a clerical error as to the adjudication of dependency.

The juveniles were born in 2007. Kentucky authorities became involved with the family in 2008 based on reports of domestic violence between respondent and the juveniles' father. A Kentucky court granted the father custody of the juveniles. The family moved to North Carolina in December of 2011, and respondent and the father have been involved in domestic violence and custody disputes in North Carolina since March of 2012.

On 31 May 2013, the Johnston County Department of Social Services ("DSS") substantiated a report of neglect due to an injurious environment, based on the parents' unresolved conflict and its negative impact on the juveniles. That conflict included concerns that the juveniles had made false accusations of sexual abuse against their father at respondent's behest. On 27 June 2013, DSS filed petitions alleging that the juveniles were neglected and dependent, and it filed amended petitions on 11 July 2013.

The matter came on for an adjudication hearing on 29 August 2013. At the conclusion of the hearing, the trial court made an oral finding that the juveniles were neglected. The trial court entered its initial adjudication order on 4 October 2013, and entered an amended order on 22 October 2013. In the written orders, the trial court adjudicated the juveniles neglected and dependent. The disposition hearing took place on 12 September 2013. The trial court placed the juveniles in the custody of their paternal grandmother and provided respondent with

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supervised visitation to be held at a visitation center at her expense. Respondent appeals.

[1] In her first argument on appeal, respondent contends that the trial court failed to make adequate findings to establish its jurisdiction, in light of the prior case in Kentucky. We disagree.

“This Court’s determination of whether a trial court has subject matter jurisdiction is a question of law that is reviewed on appeal *de novo*.” *Powers v. Wagner*, 213 N.C. App. 353, 357, 716 S.E.2d 354, 357 (2011) (citation and quotation omitted). The district court has “exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-200(a) (2013). The jurisdictional requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to the Juvenile Code. *In re Brode*, 151 N.C. App. 690, 692-94, 566 S.E.2d 858, 860-61 (2002).

Under the UCCJEA, a North Carolina court has jurisdiction to make an initial child-custody determination if North Carolina “is the home state of the child on the date of the commencement of the proceeding[.]” N.C. Gen. Stat. § 50A-201(a)(1) (2013). A child’s “home state” is “the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding.” N.C. Gen. Stat. § 50A-102(7) (2013). Although this Court has recognized that making specific findings of fact related to a trial court’s jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1) “would be the better practice,” the statute “states only that certain circumstances must exist, not that the court specifically make findings to that effect.” *In re T.J.D.W.*, 182 N.C. App. 394, 397, 642 S.E.2d 471, 473, *aff’d per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007). Therefore, so long as the trial court asserts its jurisdiction and there is evidence to satisfy the statutory requirements, the trial court has properly exercised subject matter jurisdiction. *Id.* at 397, 642 S.E.2d at 473-74.

In this case, the trial court made a finding that it had jurisdiction to enter an adjudication order, and the evidence shows that the juveniles have continuously resided with a parent in North Carolina since December of 2011. Although, as we have previously held, it would be the better practice for the trial court to make more specific findings of fact to support its jurisdiction, the evidence was sufficient to support the trial court’s assertion of jurisdiction pursuant to N.C. Gen. Stat. § 50A-201(a)(1). Accordingly, respondent’s first argument lacks merit.

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[2] Next, respondent contends that the trial court erred by adjudicating the juveniles neglected and dependent. We first address respondent's argument that the trial court erred by adjudicating the juveniles neglected. Respondent disputes the trial court's conclusion that the effect of the parents' domestic violence and discord on the juveniles was sufficient to support an adjudication of neglect. Respondent also disputes the trial court's finding that respondent failed to submit to DSS's in-home services. We do not agree with respondent's contentions.

"The allegations in a petition alleging abuse, neglect, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2013). In reviewing an adjudication order, this Court must determine "(1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

N.C. Gen. Stat. § 7B-101, in part, defines a neglected juvenile as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent" or "who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2013). A parent's refusal to cooperate with DSS's attempts to offer services and a "long standing" and "enduring" history of domestic violence between the parents are factors that support an adjudication of neglect. *In re B.M.*, 183 N.C. App. 84, 89, 643 S.E.2d 644, 647 (2007).

Here, the trial court's findings of fact support its conclusion that the juveniles were neglected. The trial court found that the parents' history of domestic violence dated back to the initial investigation in Kentucky, that the juveniles were aware of the violence and domestic discord, and that a Child and Family Evaluation indicated that the parents were not able to parent the juveniles due to "their continued conflicts with each other and the impact the conflicts have on the children." Specifically, the trial court found:

16. [T]he children were negatively impacted by witnessing the parents' domestic discord and that it caused the children emotional stress. The Court further finds that the children were put in the middle of the parents' dispute, which also caused stress upon the children.

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The Court is further concerned about the children being coached to make allegations in an effort to circumvent the domestic action.

In addition, the trial court found that respondent refused to develop an in-home services agreement with DSS to address the identified issues.

Contrary to respondent's contentions, these findings are supported by the evidence introduced at the adjudication hearing, specifically the testimony of a social worker, and in turn support the trial court's conclusion that the juveniles were neglected. Respondent points to her own testimony that she only "hesitated" in response to DSS's efforts to implement in-home services, but the trial court was free to weigh that testimony against the social worker's contradictory testimony and make a finding adopting one point of view. Accordingly, we hold that the evidence and the trial court's findings of fact support the adjudication of neglect.

[3] Next, as respondent correctly points out, at the hearing the trial court orally concluded that the juveniles were neglected, but both the original and amended adjudication orders contain conclusions, made by checking boxes on each of the pre-printed portions of the orders, that the juveniles were neglected and dependent. We believe that the trial court's checking of the box for dependency represents a clerical error.

"A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jones*, ___ N.C. App. ___, ___, 736 S.E.2d 634, 637 (2013) (citations and quotations omitted). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citations omitted).

In this case, although DSS filed petitions alleging that the juveniles were both neglected and dependent, it only argued that they were neglected at the adjudication hearing. The trial court orally concluded that the juveniles were neglected and made findings of fact supporting that conclusion, but made none to support a conclusion that they were dependent. Accordingly, it appears that the "dependent" box on the adjudication form was inadvertently checked, and the matter should be remanded for entry of a new adjudication order that reflects the trial court's conclusion that the juveniles were neglected, but not dependent.

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[4] Finally, respondent contends that the trial court erred by ordering her to pay the costs of her supervised visitation. We disagree.

In 2013, the General Assembly enacted N.C. Gen. Stat. § 7B-905.1 (2013), which sets out the requirements for findings regarding visitation in abuse, neglect, and dependency cases.¹ Under the new statute, a disposition order that removes a juvenile from a parent's custody "shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2013). The new statute describes the findings the trial court must make defining the conditions of visitation when a child is placed with a relative, as is the case here:

(c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(c) (2013). The terms of the statute are consistent with our case law interpreting the visitation findings required by N.C. Gen. Stat. § 7B-905(c), the prior statute. *See In re J.P.*, ___ N.C. App. ___, ___, 750 S.E.2d 543, 547 (2013) (holding that a disposition order must, at a minimum, set out the time, place, and conditions of visitation).

In this case, the trial court made a finding that squarely addresses all three requirements of N.C. Gen. Stat. § 7B-905.1(c): "[Respondent] is to have a supervised visit every other week for one hour via a supervised visitation center, at her expense." Respondent does not challenge the sufficiency of this finding as to the statutory requirements and concedes that the trial court made findings that support its decision that supervised visitation was in the juveniles' best interests under the circumstances.

Instead of challenging the need for supervised visitation or the trial court's findings, respondent first contends that the Juvenile Code does not permit the trial court to order her to pay the cost of supervised

1. Formerly, visitation was addressed in the disposition statute, N.C. Gen. Stat. § 7B-905(c) (2011). Section 7B-905.1 was effective 1 October 2013, and applies to actions "filed or pending on or after that date." 2013 N.C. ALS 129. The disposition order in this matter was entered 15 October 2013. Therefore, the matter was pending as of the effective date of the new statute, and we must review the disposition order under the terms of the new statute.

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visitation. When an argument presents an issue of statutory interpretation, full review is appropriate, and the trial court's conclusions of law are reviewed *de novo*. *Romulus v. Romulus*, 216 N.C. App. 28, 32, 715 S.E.2d 889, 892 (2011) (citations omitted). "If the language of the statute is clear, this Court must implement the statute according to the plain meaning of its terms." *Whitman v. Kiger*, 139 N.C. App. 44, 46, 533 S.E.2d 807, 808 (2000), *aff'd per curiam*, 353 N.C. 360, 543 S.E.2d 476 (2001) (citation omitted).

Here, respondent's argument is contradicted by the plain language of the statute, which provides: "The court may specify in the order conditions under which visitation may be suspended." N.C. Gen. Stat. § 7B-905.1(a). Thus, in the best interests of the juvenile, the trial court has the authority to set conditions for visitation, as the trial court did in this case by requiring respondent to pay the costs of visitation. We also note that other sections of the Juvenile Code, including N.C. Gen. Stat. § 7B-903 and -904, permit the trial court to impose costs on the parents of a juvenile adjudicated abused, neglected, or dependent. Accordingly, we disagree with respondent's contention that the Juvenile Code does not authorize the trial court to order her to pay the costs of supervised visitation.

Next, respondent contends the trial court erred by ordering her to pay the costs of supervised visitation without making any findings that she was able to do so. Respondent cites no authority to support her assertion that such findings are required pursuant to N.C. Gen. Stat. § 7B-905.1, or its predecessor, N.C. Gen. Stat. § 7B-905(c). Instead, respondent relies on case law interpreting other statutes, including N.C. Gen. Stat. § 7B-904 and N.C. Gen. Stat. § 50-13.4, to support her argument. *See, e.g., In re W.V.*, 204 N.C. App. 290, 296-97, 693 S.E.2d 383, 388 (2010) (holding that the trial court must make findings that a parent is able to pay a reasonable portion of the cost of foster care before ordering her to do so).

We find respondent's argument on this point to be unpersuasive. The section of the Juvenile Code cited in *In re W.V.* specifically instructs courts to consider the parents' ability to pay. *See* N.C. Gen. Stat. § 7B-904(d) (providing that the trial court may order a parent to pay support "if the court finds that the parent is able to do so"). This specific directive is significant in interpreting the intent of the legislature in enacting the statute, and there is no such statutory instruction as to the costs of supervised visitation in the recently enacted N.C. Gen. Stat. § 7B-905.1(c). Further, the terms of the disposition order in this case

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account for a 90-day review hearing, and N.C. Gen. Stat. § 7B-905.1(d) (2013) specifically authorizes all parties to “file a motion for review of any visitation plan entered pursuant to this section.” N.C. Gen. Stat. § 7B-905.1(d). Thus, respondent has ample opportunity to present evidence of her inability to pay the cost of supervised visitation and have the visitation plan modified, should the need arise. Accordingly, we affirm the visitation portion of the disposition order.

In sum, we affirm the trial court’s adjudication of neglect and the disposition order, but remand the matter for correction of clerical error in the adjudication order.

Affirmed, in part; remanded, in part.

Chief Judge MARTIN concurs.

HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

Though I agree with the majority’s decision to affirm the trial court’s adjudication of neglect and to remand for correction of a clerical error as to the adjudication of dependency, I cannot agree with the majority’s decision to affirm the visitation portion of the disposition order. Pursuant to N.C. Gen. Stat. § 7B-905.1(a) (2013), the trial court should consider a parent’s ability to pay before requiring the parent to pay supervised visitation costs. Accordingly, because the court below ordered respondent to pay the costs of supervised visitation without making any findings that she was able to do so, I respectfully dissent from the majority on this issue.

The potential consequences of failing to pay the costs of supervised visitation includes having visitation suspended, a condition which, if uncured, could ultimately lead to the termination of parental rights. This Court has consistently held that a parent’s poverty, alone, should not be grounds for termination of parental rights. *See In re T.D.P.*, 164 N.C. App. 287, 290–91, 595 S.E.2d 735, 738 (2004), *aff’d per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005). Denying visitation to a poor parent who was required, but unable, to pay the costs of visitation conditions an important constitutional right on wealth. As judges, we have a duty to construe statutes so that their application would not violate either the Constitution of North Carolina or the United States Constitution. *See, e.g., Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 465, 223 S.E.2d 323, 328 (1976) (“If a statute is reasonably susceptible of two

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constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, it is well settled that the courts should construe the statute so as to avoid the constitutional question.”). Requiring the trial court to make findings of fact addressing a parent’s ability to pay before ordering the parent to pay the costs of supervised visitation would obviate any unconstitutional result.

Accordingly, because N.C. Gen. Stat. § 7B-905.1(a) is silent as to whether the trial court must make the findings at issue, and because the majority’s holding could lead to undesirable outcomes for poverty-stricken parents, I respectfully dissent. I would remand the disposition order for further findings of fact addressing respondent’s ability to pay the costs of supervised visitation before entering such an order.

IN RE GREGORY S. LYNN AND RENEE J. LYNN, PLAINTIFFS
v.
FEDERAL NATIONAL MORTGAGE ASSOCIATION AND SETERUS, INC., DEFENDANTS

No. COA13-1334

Filed 15 July 2014

Fiduciary Relationship—debtor-creditor—right of redemption—trustee

The trial court did not err by dismissing plaintiffs’ complaint under North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. The statutory right of redemption created by N.C.G.S. § 45-21.20 does not give rise to a fiduciary relationship and plaintiffs failed to disclose any additional facts supporting the existence of a fiduciary relationship. Furthermore, as no facts indicated that the trustee or substitute trustee was joined as a defendant, no party owing a fiduciary duty to plaintiffs was a party to this breach of fiduciary duty claim.

Appeal by plaintiffs from order entered 11 July 2013 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 24 April 2014.

Elliot Law Firm, PC, by Michael K. Elliot, for Plaintiffs-Appellants.

No brief filed on behalf of Defendants-Appellees.

HUNTER, JR., Robert N., Judge.

Gregory S. Lynn and Renee J. Lynn (collectively, “Plaintiffs”) appeal from a final order dismissing their complaint under N.C. R. Civ. P. 12(b)(6). Plaintiffs contend that their complaint shows the existence and breach of a fiduciary duty owed to them by Federal National Mortgage Association (“Fannie Mae”) and Seterus, Inc. (“Seterus”) (collectively “Defendants”). For the following reasons, we affirm the trial court’s order.

I. Facts & Procedural History

The complaint states the following facts. Plaintiffs owned a home at 1012 King Grant Way in Matthews. On 19 April 2007, plaintiff Gregory Lynn executed a promissory note (“the Note”) to JP Morgan Chase Bank (“Chase”) with a principal balance of \$360,000. The loan was described on the Note as an “Interest First Note.” On 19 April 2007, Plaintiffs also executed a deed of trust (“the Deed”) securing the Note.¹ The Deed was recorded in Union County and named Constance R. Stienstra as the trustee and Chase as the lender and beneficiary of the instrument.

In early 2011, Plaintiffs received notice that Seterus had become the servicer of the loan and that Fannie Mae was the holder of the Note and Deed after having purchased the Note at some point after 19 April 2007. The complaint indicates that a “Substitute Trustee” was appointed at some point after 19 April 2007 and references a “Defendant Substitute Trustee,” but does not identify either party. Plaintiffs’ appellate brief identifies the substitute trustee as “Trustee Services of Carolina, Inc.”²

On 26 October 2011, after Plaintiffs fell behind on payments, “Plaintiffs received a ‘Notice of Hearing,’ from Defendant Substitute Trustee which initiated a Union County Special Proceeding Case entitled: ‘Foreclosure of Real Property Under Deed of Trust from Gregory Scott Lynn and Renee Jeanette Lynn’” Plaintiffs filed for Chapter 13 bankruptcy on 28 December 2011, which was later converted to a Chapter 7 filing. Fannie Mae filed a motion for relief from the automatic stay. Plaintiffs filed a motion in response challenging Fannie Mae’s status

1. The Deed and Note were not included in the record on appeal.

2. At Defendants’ 12(b)(6) hearing, Plaintiffs and Defendants both stated that the trustee is not a party to this case.

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as the holder of the Note. Both Fannie Mae and Seterus were granted relief from the automatic stay, but there were no findings of fact relating to their status as the holder of the Note.

On 21 May 2012, before the entry of the order granting relief from the automatic stay, Plaintiffs received documents from Seterus indicating Plaintiffs could modify their loan. Plaintiffs promptly signed and returned those documents. As part of the modification, Plaintiffs were required to make three trial payments of \$2,332.14 on 1 July 2012, 1 August 2012, and 1 September 2012. On 30 June 2012, Plaintiffs sent their initial July payment. However, Plaintiffs sent \$2,300.00 instead of the required \$2,332.14. Because Plaintiffs remitted an incorrect amount, Defendants rejected the loan modification.

Following the rejection, the "Substitute Trustee" gave notice to Plaintiffs of the foreclosure sale which was to take place on 5 September 2012. After the sale, but prior to the expiration of the ten-day upset bid period, Plaintiffs filed an action designated 12 CVS 2676 enjoining the foreclosure sale pursuant to N.C. Gen. Stat. § 45-21.34 (2013).

On 28 January 2013, "Plaintiffs, by and through Counsel, requested from Counsel for Defendants a re-instatement quote so that Plaintiffs could exercise their Right of Redemption" ³ The same day, Defendants sent an email to Plaintiffs' counsel asking Plaintiffs to make a settlement offer. Plaintiffs offered to send a discounted lump sum to Defendants sometime between 28 January 2013 and 25 March 2013. Plaintiffs assert they had a family friend that was "ready, willing, and able to pay the re-instatement amount." Plaintiffs state that the offer was eventually rejected sometime before 25 March 2013. During the intervening period, Defendants provided no redemption or reinstatement quote. The 12(b)(6) hearing transcript indicates that after Plaintiffs made a lump sum offer, Plaintiffs made no attempt to contact Defendants regarding redemption until after Defendants rejected Plaintiffs' offer. At the 12(b)(6) hearing, Plaintiffs argued that proffering any estimate of a reasonable offer was futile because Defendants rejected the loan modification payment for being \$32.14 short.

Following the 25 March 2013 hearing concerning 12 CVS 2676, the court dissolved the preliminary injunction. On 23 April 2013, a "Substitute Trustee's" deed was recorded which conveyed the property

3. During the 12(b)(6) hearing, Plaintiffs moved to amend their complaint to specifically allege the statutory right of redemption in addition to the right of reinstatement. The court did not respond to that request at the 12(b)(6) hearing.

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to Fannie Mae. Plaintiffs received a letter from Defendants disclosing the payoff amount for the loan on 29 April 2013, after the upset period had passed. Plaintiffs were given notice to vacate their home on 9 May 2013. According to Plaintiffs' appellate brief, Plaintiffs have since vacated the home.

On 30 May 2013, following the dismissal of the claims in 12 CVS 2676, Plaintiffs filed the present complaint for preliminary injunction, breach of fiduciary duty, misrepresentation, and unfair and deceptive trade practices. Plaintiffs also filed a motion for a temporary restraining order against Defendants on 30 May 2013. The motion was denied on 6 June 2013. Defendants then filed a motion to dismiss under N.C. R. Civ. P. 12(b)(6) and a motion for attorneys' fees on 10 June 2013. Defendants amended these motions on 21 June 2013. Judge Lee granted the motion to dismiss on 12 July 2013 and denied Defendants' motion for attorneys' fees. Plaintiffs provided timely written notice of appeal on 26 July 2013.

II. Jurisdiction & Standard of Review

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013) as Plaintiff appeals from a final order of the superior court as a matter of right.

“‘On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted.’” *Allred v. Capital Area Soccer League, Inc.*, 194 N.C. App. 280, 282, 669 S.E.2d 777, 778 (2008) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.

Wood, 355 N.C. at 166, 558 S.E.2d at 494.

“Under *de novo* review, we examine the case with new eyes.” *State v. Young*, ___ N.C. App. ___, ___, 756 S.E.2d 768, 779 (2014).

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"[D]e novo means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks and citation omitted).

III. Analysis

Plaintiffs argue that the statutory right of redemption created by N.C. Gen. Stat. § 45-21.20 (2013)⁴ gives rise to a fiduciary relationship requiring disclosure of the redemption amount upon a debtor's request. After careful review, we disagree and affirm the trial court.

A. Fiduciary Relationship in Redemption

"For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). Fiduciary relationships are established when a special confidence is placed in a party which is bound to act in good faith and in the best interest of the party who reposes that confidence. *Abbott v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). A number of relationships traditionally give rise to fiduciary duties, such as attorney and client, broker and principal, guardian and ward, and trustee and beneficiary. *Id.* Fiduciary duties may also be established in "a variety of circumstances" within *any relationship* "where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* The determination of such a relationship is generally a question of fact to be determined by the jury. *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 53 (2009).

4. The statutory right to redemption provides that a debtor may terminate the power of sale by tendering the remaining obligation secured by the deed of trust and expenses incurred in the sale of the property before the foreclosure sale or within the upset bid period. N.C. Gen. Stat. § 45-21.20. Plaintiffs requested a "re-instatement quote" in their complaint and also referenced the statutory right of redemption in their complaint.

Plaintiffs clarified at the 12(b)(6) hearing that they intended to include the right of redemption and asked, if need be, to amend their complaint to include this claim. On appeal, Plaintiffs do not raise any argument concerning a contractual right to reinstatement and thus abandon any argument relating to reinstatement. N.C. R. App. P. 28(b)(6).

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Our Supreme Court recently addressed the fiduciary duties inherent in a typical debtor-creditor relationship in *Dallaire v. Bank of America*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, 51PA13, 2014 WL 2612658 (2014):

Ordinary borrower-lender transactions, by contrast, are considered arm's length and do not typically give rise to fiduciary duties. In other words, the law does not typically impose upon lenders a duty to put borrowers' interests ahead of their own. Rather, borrowers and lenders are generally bound only by the terms of their contract and the Uniform Commercial Code. Nonetheless, because a fiduciary relationship may exist under a variety of circumstances, it is possible, at least theoretically, for a particular bank-customer transaction to give rise to a fiduciary relation given the proper circumstances.

Id. at ___, ___ S.E.2d at ___, 2014 WL 2612658 at *4 (citations and quotation marks omitted). Applying this test in *Dallaire*, our Supreme Court found that "[a] loan officer's mere assertion that the Dallaires could obtain a first priority lien mortgage loan" was not sufficient to allow our Supreme Court to conclude the Dallaires reposed fiduciary duties in Bank of America. *Id.* (citation and quotation marks omitted).

The right of redemption may arise in any typical foreclosure proceeding; it is a statutorily created right to terminate a power of sale. N.C. Gen. Stat. § 45-21.20. Nothing about the statute indicates that the moment a debtor attempts to act upon its right of redemption is anything other than an ordinary part of a debtor-creditor relationship during foreclosure proceedings. As this is an ordinary feature of debtor-creditor relationships, here the debtor or creditor must show some additional fact which tends to elevate the relationship above that of a typical debtor and creditor.

Here, Plaintiffs simply assert that a fiduciary relationship is created by Plaintiffs' invocation of the right of redemption or Defendants' response email requesting Plaintiffs make an offer to pay off the loan. As in *Dallaire*, merely invoking a statutorily created right in a debtor-creditor transaction, like a loan officer making assertions concerning possible lien priorities, does not alone create a fiduciary relationship. *Dallaire*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2014 WL 2612658 at *4. As Plaintiffs fail to disclose any additional facts supporting the existence

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of a fiduciary relationship, dismissal was proper under N.C. R. Civ. P. 12(b)(6), as this was a normal debtor-creditor relationship.⁵

B. Trustee Fiduciary Relationship

Trustees,⁶ on the other hand, have a long-recognized fiduciary duty to both the debtor and creditor in a typical foreclosure proceeding. *In re Vogler Realty, Inc.*, 365 N.C. 389, 397, 722 S.E.2d 459, 465 (2012). The trustee, vested in a position of power by the debtor and creditor, is bound to act in the interests of the parties and exercise its powers accordingly. *Id.* at 397, 722 S.E.2d at 465.

The complaint shows that neither Fannie Mae nor Seterus were the trustee or the substitute trustee when Defendants requested Plaintiffs make a lump sum offer, nor at any other point in the proceedings. At the 12(b)(6) hearing, both parties stated that the trustee is not a defendant in the case. Moreover, in Plaintiffs' appellate brief, Plaintiffs name the substitute trustee as Trustee Services of Carolina, LLC. As no facts indicate that the trustee or substitute trustee was joined as a defendant, no party owing a fiduciary duty to Plaintiffs is a party to this breach of fiduciary duty claim. Accordingly, dismissal under N.C. R. Civ. P. 12(b)(6) was proper.

IV. Conclusion

For the reasons stated above, the decision of the trial court is

AFFIRMED.

Judges STROUD and DILLON concur.

5. In *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 418 S.E.2d 694 (1992), this Court held that no fiduciary duty existed where borrowers relied on outside counsel and advice as well as representations made by a lender. *Id.* at 60–61, 418 S.E.2d at 699. The reliance on the advice from a banker, accountant, and their business partner showed that they had not reposed any sort of special confidence with the plaintiff. *Id.*

Here, Plaintiffs were represented by an attorney when they requested the redemption amount. Plaintiffs' attorney initially requested the redemption price, received Defendants' email requesting that Plaintiffs make an offer, and replied with the sum which was eventually rejected. As Plaintiffs relied on outside counsel, dismissal is also proper under the standard announced in *Branch Banking & Trust*.

6. In this case, it seems that the parties substituted the trustee at some point before Plaintiff fell behind on payments. The parties are generally free to substitute a trustee. N.C. Gen. Stat. § 45-10 (2013). The substitute trustee is generally vested with the powers of the original trustee, and among those powers is the power to proceed with foreclosure upon a deed in default. *Id.*; *Pearce v. Watkins*, 219 N.C. 636, 642, 14 S.E.2d 653, 656 (1941).

LEWIS v. LESTER

[235 N.C. App. 84 (2014)]

ROBERT F. LEWIS, PLAINTIFF

v.

LEWIS LESTER, DEFENDANT

No. COA14-147

Filed 15 July 2014

1. Contracts—agreement to divide estate—consideration—actions by family member

Summary judgment was properly granted for defendant in an action between two nephews who acted as power of attorney for an uncle regarding their alleged oral agreement while their uncle was alive to divide the estate, and their uncle leaving the estate to defendant. Although plaintiff argued that action to his detriment after his uncle's death was evidence of the contract, those actions were not contemplated at the time of the agreement and could not constitute consideration. Furthermore, plaintiff conceded that he would have acted as power of attorney and performed services for his uncle regardless of any agreement with defendant and expected no compensation.

2. Contracts—oral agreement to divide estate—real property included—statute of frauds

Summary judgment was correctly granted to defendant in a case involving two nephews who held powers of attorney for an uncle and who allegedly orally agreed to divide the estate, which the uncle willed to one of them. The alleged oral agreement was to divide an estate which included both real and personal property and was therefore not enforceable because it was not in writing.

Appeal by plaintiff from judgment entered on 6 August 2013 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 19 May 2014.

OERTEL, KOONTZ & OERTEL, PLLC, by Geoffrey K. Oertel for plaintiff-appellant.

BENSON, BROWN & FAUCHER, PLLC, by James R. Faucher for defendant-appellee.

STEELMAN, Judge.

LEWIS v. LESTER

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Where the plaintiff failed to demonstrate that there was consideration supporting an alleged oral agreement, the trial court properly granted summary judgment for defendant. Where the property in decedent's estate included both real and personal property, the statute of frauds required the alleged agreement to be in writing. This is a separate and independent basis for affirming the ruling of the trial court.

I. Factual and Procedural Background

Robert F. Lewis (plaintiff) and Lewis T. Lester (defendant) are the nephews of Floyd H. Lewis (Lewis). On 1 September 2006, plaintiff and defendant were both designated as power of attorney for Lewis. Plaintiff and defendant discovered Lewis' will in January of 2007, learning that plaintiff was not included as a beneficiary in the will. The will provided that all of Lewis' real and personal property was devised to defendant and his sister. Lewis died in December 2011. Defendant's sister predeceased Lewis, resulting in the entire estate passing to defendant.

In his complaint, plaintiff alleged that in September 2006, the parties made an oral agreement regarding the property of their uncle. Defendant allegedly agreed to split Lewis' estate equally with plaintiff in exchange for plaintiff acting as power of attorney for Lewis. The complaint also states that the parties were aware of the contents of Lewis' will at the time of this agreement.

However, in his deposition, plaintiff admitted that he did not become aware of the contents of the will until January 2007, some four months after the alleged agreement took place. Plaintiff further stated in his deposition that he would have acted as his uncle's power of attorney regardless of any agreement he made with defendant.

The Power of Attorney allowed defendant and plaintiff to each act independently as power of attorney for Lewis. Before Lewis' death, defendant used his authority as power of attorney to change the beneficiary on several of Lewis' bank accounts from his deceased sister to plaintiff. As a result of those actions, plaintiff received approximately \$204,000 of Lewis' property.

In April 2012, plaintiff learned of an additional bank account in Lewis' name at First Citizens Bank in the amount of \$84,000. Defendant refused to split the proceeds of the account with plaintiff. Plaintiff commenced this action by filing a complaint on 5 October 2012, seeking to enforce the alleged oral agreement.

Plaintiff sought to recover one-half of the assets of Lewis' estate, which included real property. On 18 October 2012, defendant filed an

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answer that contained a number of affirmative defenses; including lack of consideration and statute of frauds. On 17 July 2013, defendant filed a motion for summary judgment based upon the depositions of plaintiff, Brian Lewis, and defendant.

On 7 August 2013, Judge Doughton filed an order granting summary judgment in favor of defendant.

Plaintiff appeals.

II. Summary Judgment

In his sole argument on appeal, plaintiff contends that the trial court erred in granting defendant's motion for summary judgment. We disagree.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

B. Analysis

1. Lack of Consideration

[1] The essential elements of a valid, enforceable contract are offer, acceptance, and consideration. *Copy Products, Inc. v. Randolph*, 62 N.C. App. 553, 555, 303 S.E.2d 87, 88 (1983). When there is no genuine issue of material fact as to the lack of consideration, summary judgment is appropriate. See *Penn Compression Moulding, Inc. v. Mar-Bal, Inc.*, 73 N.C. App. 291, 294, 326 S.E.2d 280, 283 (1985) (holding trial court should have entered summary judgment for defendant where "undisputed" evidence established that no new consideration was exchanged for plaintiff's renewed promise to pay pre-existing debt). "A mere promise, without more, lacks a consideration and is unenforceable." *Stonestreet v. S. Oil Co.*, 226 N.C. 261, 263, 37 S.E.2d 676, 677 (1946).

In the instant case, plaintiff disavowed the theory set forth in his complaint, that the consideration for the alleged agreement was his agreement to serve as power of attorney, in his deposition testimony. Plaintiff acknowledged that he was unaware of the contents of the will at the time he claims the agreement was made, and that he would have acted as power of attorney, and continued providing help to his uncle,

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regardless of any agreement with defendant, and that he expected no compensation for acting as power of attorney.

Plaintiff now attempts to assert that, “any obligation held by Robert F. Lewis to act to benefit Floyd H. Lewis ended with the death of Floyd H. Lewis. Thus, any actions taken following the death of Floyd H. Lewis were taken at the detriment or loss of Robert F. Lewis and are admissible evidence of the bargained for legal detriment of the contract between the Defendant and Plaintiff.” This argument is without merit because these actions were not contemplated at the time the alleged agreement was made and therefore cannot constitute consideration for that agreement.

Past consideration or moral obligation is not adequate consideration to support a contract. *See Jones v. Winstead*, 186 N.C. 536, 540, 120 S.E. 89, 90–91 (1923). Furthermore, “services performed by one member of the family for another, within the unity of the family, are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation.” *Allen v. Seay*, 248 N.C. 321, 323, 103 S.E.2d 332, 333 (1958) (quoting *Francis v. Francis*, 223 N.C. 401, 402, 26 S.E.2d 907, 908 (1943)).

This presumption can be rebutted by evidence that the party rendering the services reasonably expected compensation for those services. *Penley v. Penley*, 314 N.C. 1, 18, 332 S.E.2d 51, 61 (1985). There is no such evidence in the instant case. Plaintiff conceded that he would have acted as power of attorney and performed services for his uncle regardless of any agreement with defendant, and expected no compensation.

This argument is without merit.

2. Statute of Frauds

[2] The trial court’s order granting summary judgment does not specify a basis for granting summary judgment. Plaintiff argued against the application of the statute of frauds before the trial court on summary judgment, but on appeal fails to make any argument pertaining to the statute of frauds. Defendant asserted the affirmative defense of statute of frauds in his answer. This constitutes a separate and independent basis supporting the trial court’s entry of summary judgment.

“It is settled law in North Carolina that an oral contract to convey or to devise real property is void by reason of the statute of frauds (G.S. § 22-2). An indivisible oral contract to devise both real and personal property is also void.” *Pickelsimer v. Pickelsimer*, 257 N.C. 696, 698, 127 S.E.2d 557, 559 (1962) (citing *Grady v. Faison*, 224 N.C. 567, 31 S.E.2d

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760 (1944)). Furthermore, “[u]pon a plea of the statute, it may not be specifically enforced and no recovery of damages for the loss of the bargain can be predicated upon its breach.” *Id.* at 698, 127 S.E.2d at 560 (citing *Daughtry v. Daughtry*, 223 N.C. 528, 24 S.E.2d 446 (1943)).

The alleged agreement between plaintiff and defendant was to divide the assets of Lewis’ estate, which included both real and personal property. Therefore, the agreement is unenforceable because it was not in writing.

We hold that the trial court did not err in granting defendant’s motion for summary judgment.

AFFIRMED.

Chief Judge MARTIN and Judge DILLON concur.

GRANT A. LOOSVELT, PLAINTIFF/FATHER
v.
STACY LEIGH BROWN, DEFENDANT/MOTHER

No. COA13-747

Filed 15 July 2014

**1. Child Custody and Support—pre-birth non-medical expenses—
not allowed**

In an action to establish paternity, custody, and support, an award for nursery expenses and maternity clothes incurred prior to the child’s birth was reversed. The legal obligation arises when the child is born and expenses incurred prior to the child’s birth cannot be considered as retroactive child support, with the only exception being medical expenses as allowed by statute. While it is reasonable to incur expenses in preparation for the birth of a baby, there is no evidence or argument that nursery expenses and maternity clothes could qualify as “medical expenses” under even the most generous definition.

**2. Child Custody and Support—retroactive support—post-birth
expenses—date incurred—insufficient evidence**

A retroactive child support award for nursery expenses and basic needs incurred after the child’s birth was reversed for

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insufficient evidence that the expenses were incurred prior to filing the complaint.

3. Child Custody and Support—retroactive support—ability to pay—relevant time period

An award of retroactive child support for post-birth expense for daycare, child care, and the child's birth was remanded for findings as to plaintiff's ability to pay during the time period for which reimbursement was sought.

4. Child Custody and Support—retroactive support—allotment of expenses

An award of retroactive child support was remanded partly because the appellate court could not discern from the findings why the trial court failed to allot any portion of the retroactive expenses as defendant's responsibility.

5. Child Custody and Support—support—plaintiff's income—findings

An award of prospective child support was remanded for findings as to the monetary value of plaintiff's income and any other findings of fact or conclusions of law necessary to set an appropriate child support amount. The trial court's findings listed plaintiff's average gross monthly income and stated that plaintiff "is a man with substantial income," but there was no finding as to plaintiff's actual income. Furthermore, the income on which the court based the finding that plaintiff was able to pay the child support ordered was not clear, and it did not make any findings which would permit consideration of plaintiff's estate as supporting his ability to pay child support.

6. Child Custody and Support—support—child's reasonable needs—findings

Where a child support award was remanded for other reasons, the trial court was also instructed to make findings of fact with monetary values as to the child's reasonable needs in light of the abilities of the parents to provide support. The amount of child support ordered far exceeded the actual needs of the child based upon the child's historical individual expenditures. Although the trial court has the discretion to award child support in excess of actual historical expenses based upon plaintiff's financial position, the findings of fact as to how this amount was established must be detailed enough to permit appellate review.

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7. Child Custody and Support—support—earnings and conditions of parties—non-quantifiable contributions—findings

Where a child support order was remanded for several reasons, the trial court was ordered on remand to take into account the earnings, conditions and standard of living of both parties in a manner reviewable on appeal. Not all of the factors under N.C.G.S. § 50-13.4(c) can be quantified and it is appropriate for the trial court to consider the fact that defendant bears 100% of the daily responsibilities of child care and making a home for the child. If the court does so, it should make reviewable findings.

8. Attorney Fees—child custody and support—custody still at issue—findings

Child custody was still at issue when a judgment concerning child support was entered and the trial court was not required to find that plaintiff had refused to provide prior support to the child when awarding attorney fees. Although plaintiff and defendant may have believed and acted as though they had resolved the custody claims before entry of the order, custody was still at issue when the case was called for hearing and was not addressed by the trial court until its final order.

9. Attorney Fees—child custody and support—findings sufficient—no necessity for ability to pay

The trial court made sufficient findings of fact to support the award of attorney fees in a child custody and support action. There is no requirement of a finding that the party being ordered to pay have the ability to pay.

Appeal by plaintiff from order entered 1 April 2013 by Judge Donnie Hoover in District Court, Mecklenburg County. Heard in the Court of Appeals 19 November 2013.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, by defendant-appellee.

STROUD, Judge.

Plaintiff appeals order regarding permanent child custody and child support. For the following reasons, we affirm in part and reverse and remand in part.

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I. Background

Plaintiff, a resident of Los Angeles, California, filed a complaint in North Carolina against defendant, a resident of Charlotte, North Carolina. Plaintiff sought to establish the paternity of a child born out of wedlock, to determine custody, and an order addressing the parties' support obligations. On 7 December 2011, defendant filed an answer and counterclaims seeking child custody, child support, and attorney fees. On or about 10 April 2012, defendant filed a request "to upwardly deviate from the North Carolina Child Support Guidelines[.]" On 7 May 2012, plaintiff replied to defendant's counterclaims admitting "it is in the best interest of the minor child that his primary custody be awarded to" defendant, stating that "child support should be awarded in accordance with North Carolina law[.]" and denying allegations related to defendant's request for attorney fees.

On 24 May and 20 June 2012, both *nunc pro tunc* to 16 April 2012, the trial court entered temporary child support orders. The trial court ordered that plaintiff make monthly child support payments in the amount of \$2,317.00. Defendant's claim for retroactive child support was to be heard at a later date along with her claim for attorney fees.

On 1 April 2013, *nunc pro tunc* to 4 January 2013, the trial court entered a corrected order regarding permanent child custody and child support finding that because the aggregate of the parties' adjusted gross incomes exceeded \$25,000.00 per month, the North Carolina Child Support Guidelines were not controlling for this case. The order established paternity and custody of the minor child, set plaintiff's retroactive and prospective child support obligations as well as arrearages, and awarded attorney fees to defendant. As to the child support obligations and attorney fees, the trial court ordered:

4. Effective November 1, 2012, and continuing on the first (1st) day of each month thereafter until modified by this Court. Plaintiff/Father shall pay child support to Defendant/Mother in the amount of \$7,342.84 per month. All payments shall be made directly to Defendant/Mother on or before the first (1st) day of each month.

5. Plaintiff/Father shall be responsible for ninety percent (90%) and Defendant/Mother shall be responsible for 10 percent (10%) of all uninsured medical, dental, optical, orthodontic, therapy, counseling, prescription drug expenses, and any other expenses incurred by the minor

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child in connection with his healthcare that is not covered by the major medical insurance provider(s). In the event Defendant/Mother is required to advance any of the foregoing expenses to be paid by Plaintiff/Father as set forth above, Plaintiff/Father shall reimburse Defendant/Mother within thirty (30) days of the receipt of written verification of said expenses.

6. Plaintiff/Father's child support arrearage in the amount of \$15,077.52 shall be paid in full on or before March 5, 2013.

7. Plaintiff/Father's retroactive child support obligation in the amount of \$39,655.27 shall be paid in full on or before March 5, 2013.

8. Defendant/Father shall pay to Plaintiff/Mother's counsel the sum of \$24,942.21 to partially defray Plaintiff/Mother's legal fees. Defendant/Father shall make this payment directly to Claire J. Samuel, James, McElroy & Diehl, P.A., 600 South College Street, Charlotte, NC 28202 on or before March 15, 2013.

Plaintiff appeals.

II. Retroactive Child Support

Plaintiff first argues that the trial court erred in awarding retroactive child support because the trial court "[f]ailed to [m]ake [f]indings of [f]act to [s]upport its [a]ward[.]" lacked evidence to support its award, and failed to apportion the expenses incurred between both parties. Our Court has stated:

an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. These conclusions must be based upon factual findings sufficiently specific to indicate that the trial court took due regard of the factors enumerated in the statute, namely, the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

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These findings must, of course, be based upon competent evidence, and it is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it. In short, the evidence must support the findings, the findings must support the conclusions, and the conclusions must support the judgment; otherwise, effective appellate review becomes impossible.

Atwell v. Atwell, 74 N.C. App. 231, 234, 328 S.E.2d 47, 49 (1985) (citations, quotation marks, and ellipses omitted). Furthermore,

[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion. Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. In a case for child support, the trial court must make specific findings and conclusions. The purpose of this requirement is to allow a reviewing court to determine from the record whether a judgment, and the legal conclusions which underlie it, represent a correct application of the law.

Leary v. Leary, 152 N.C. App. 438, 441-42, 567 S.E.2d 834, 837 (2002) (citations and quotation marks omitted).

"The ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the obligor to meet the needs." *Robinson v. Robinson*, 210 N.C. App. 319, 333, 707 S.E.2d 785, 795 (2011) (citation, quotation marks, and brackets omitted). Retroactive child support encompasses "[c]hild support awarded prior to the time a party files a complaint[.]" *Carson v. Carson*, 199 N.C. App. 101, 105, 680 S.E.2d 885, 888 (2009) (citation and quotation marks omitted). "However, retroactive child support payments are only recoverable for amounts actually expended on the child's behalf during the relevant period. Therefore, a party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child, and evidence that such expenditures were reasonably necessary." *Robinson*, 210 N.C. App. at 333, 707 S.E.2d at 795 (citation, quotation marks, and brackets omitted).

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A. Findings of Fact as to Retroactive Child Support Expenses

The trial court awarded defendant retroactive child support from October 2010, the date of the child's birth, through November 2011, the month following the filing of plaintiff's complaint. The retroactive child support award of \$39,655.27¹ was reimbursement for the following:

- "\$5,160 in nursery expenses prior to [the child's] birth"
- "806.13 in maternity clothes prior to [the child's] birth"
- "\$460.00 in additional daycare cost for [the child] from October 28, 2011 through March 20, 2012"
- "\$1,313.54 in nursery expenses after [the child's] birth"
- "\$6,485.67 in expenses related to the minor child's basic needs (i.e. baby food, diapers, formula, and clothing) after the minor child's birth"
- "\$11,520.00 to provide work-related child care" in 2011
- "\$8,800.00 to provide work-related child care" in 2010
- "5,479.93 in expenses related to the minor child's birth"

Because these expenses raise different evidentiary and legal issues, we will separately address them.

1. Nursery Expenses and Maternity Clothes Prior to Birth

[1] The award for expenses incurred prior to the child's birth appears to raise a novel legal issue. We have found no authority, either in North Carolina or in any other state that addresses recovery of expenses incurred prior to the child's birth for nursery expenses or maternity clothes as retroactive child support. Apparently, defendant did not find any law to support this proposition either, as her argument is that "the fact that a 'father's duty to support his child arises when the child is born[.]' *Tidwell v. Booker*, 290 N.C. 98, 116, 225 S.E.2d 816, 827 (1976), does not preclude awarding retroactive child support covering expenditures incurred before a child's birth." Defendant seeks to analogize these expenses to medical expenses under North Carolina General Statute § 49-15. But we find that because (1) the child support obligation does not arise until birth and (2) North Carolina has a statute which limits recovery of pre-birth expenses to medical expenses, there is no legal

1. We note that these expenses actually add up to \$40,025.27, although neither party has challenged the accuracy of the numbers in the trial court order.

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basis for an award of any other types of expenses incurred prior to birth. See N.C. Gen. Stat. § 49-15 (2011); *Freeman v. Freeman*, 103 N.C. App. 801, 803, 407 S.E.2d 262, 263 (1991).

“A parent’s obligation to support his child arises *when the child is born*, not when the courts order a specific amount to be paid.” *Freeman v. Freeman*, 103 N.C. App. 801, 803, 407 S.E.2d 262, 263 (1991) (emphasis added). As the legal obligation arises when the child is born, expenses incurred prior to the child’s birth cannot be considered as retroactive child support; see *Robinson*, 210 N.C. App. at 333, 707 S.E.2d at 795; *Freeman*, 103 N.C. App. at 803, 407 S.E.2d at 263, the only exception to this rule is North Carolina General Statute § 49-15² which allows for “medical expenses incident to the pregnancy and birth of the child.” N.C. Gen. Stat. § 49-15. While many mothers reasonably incur expenses of many types in preparation for the birth of a baby, our General Assembly has provided for recovery of only one type of pre-birth expense, medical expenses, pursuant to North Carolina General Statute § 49-15. See *id.* Medical expenses related to the pregnancy are necessarily incurred before birth of the child, but there is no evidence or argument that these nursery expenses and maternity clothes could qualify as “medical expenses” under even the most generous definition. *Id.* Accordingly, we must reverse the award for nursery expenses and maternity clothes incurred prior to the child’s birth.

2. Nursery Expenses and Basic Needs After Birth

[2] For the nursery expenses incurred after the child’s birth and the expenses incurred for the child’s basic needs, we conclude there was not sufficient evidence to support an award of these expenses as retroactive child support because defendant did not present evidence that these expenses were actually incurred prior to the filing of the complaint. Defendant herself concedes that her evidence required the trial court “to draw the reasonable inference” regarding the dates of the expenses. Defendant’s exhibit listing the expenses showed only the merchant from which the purchase was made and the amount of the expense; defendant does not direct our attention to any evidence before the trial court, including her testimony, providing any dates for when

2. North Carolina General Statute § 49-15 provides that “[u]pon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother. When paternity has been established, the father becomes responsible for medical expenses incident to the pregnancy and the birth of the child.” N.C. Gen. Stat. § 49-15.

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the expenses were incurred. As retroactive child support may only be awarded for expenses incurred “prior to the time a party files a complaint[.]” *Carson*, 199 N.C. App. 105, 680 S.E.2d at 888, the trial court needed actual evidence upon which to determine when such expenses were incurred. Defendant’s evidence did not provide sufficient detail as to the dates that these expenses were incurred such that the trial court could reasonably find that they were incurred prior to the filing of the complaint. We reverse the award of nursery expenses and basic needs expenses incurred after the child’s birth.

3. Daycare, Child Care, and Birth Expenses

[3] For the expenses regarding daycare, child care, and the child’s birth, plaintiff does not challenge the timing of these expenses or the evidence supporting the amounts awarded. Thus, the trial court’s findings as to these expenses are binding on this court. *See Powers v. Tatum*, 196 N.C. App. 639, 640, 676 S.E.2d 89, 91 (“Where [a party] fails to challenge any of the trial court’s findings of fact on appeal, they are binding on the appellate court[.]”), *disc. review denied*, 363 N.C. 583, 681 S.E.2d 784. As to these expenses, plaintiff challenges only the trial court’s findings as to his ability to pay the award of retroactive child support, arguing that the trial court was required to make findings of fact regarding plaintiff’s “ability to pay such amounts ‘during the time for which reimbursement is sought[.]’” and “the trial court was required to exercise some amount of discretion to determine what portion of the expenses . . . [defendant] purportedly incurred . . . represent[ing] her share of support.” As plaintiff’s ability to pay child support is actually a broader issue implicating more than just daycare, child care, and birth expenses, we separately address it below.

B. Ability to Pay Retroactive Child Support

Plaintiff contends that the trial court was required to make findings regarding his ability to pay child support “during the period in which [the expenses] were purportedly incurred.” In *Hicks v. Hicks*, this Court stated that the trial court must make findings as to the obligor’s ability to pay during the time period of the retroactive support sought:

What the defendant should have paid is not the measure of his liability to plaintiff. The measure of defendant’s liability to plaintiff is the amount actually expended by plaintiff which represented the defendant’s share of support. In determining this amount the court must take into consideration the needs of the children and *the ability of the defendant to pay during the time for which reimbursement*

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is sought. The plaintiff is not entitled to be compensated for support for the children provided by others, nor is she entitled to be reimbursed for sums expended by her for the support of the children which represent her share of support as determined by the trial judge, considering “the relative ability of the parties to provide support[.]”

34 N.C. App. 128, 130, 237 S.E.2d 307, 309 (1977) (emphasis added) (citations, quotation marks, and ellipses omitted). “[T]he time for which reimbursement is sought[.]” *id.*, is not the time when this case was heard, as defendant contends – that would be the time at which reimbursement is sought – but is instead the time period during which the expenses were incurred. *See Savani v. Savani*, 102 N.C. App. 496, 502, 403 S.E.2d 900, 903 (1991) (“An award of retroactive child support must also take into account the defendant’s ability to pay during the period *in the past* for which reimbursement is sought.” (emphasis added)).

Here, the trial court specifically found that “Plaintiff/Father has the ability to pay the child support ordered herein” and “Plaintiff/Father’s income is more than sufficient to cover the awards contained herein based on his monthly expenditures and income.” Yet the trial court failed to make findings of fact as to plaintiff’s ability to pay for the time period for which reimbursement was sought, specifically, from the pre-birth medical expenses incurred until the filing of the complaint, the relevant time period for retroactive child support. *See Carson*, 199 N.C. App. at 105, 680 S.E.2d at 888, *see also* N.C. Gen. Stat. § 49-15. Therefore, we reverse and remand the order for the trial court to make findings of fact as to plaintiff’s ability to pay during that time period for which reimbursement was sought.

C. Allotment of Retroactive Child Support Expenses

[4] In addition, plaintiff raises a related issue of the trial court’s apportionment of retroactive support. Plaintiff contends “the trial court was required to exercise some amount of discretion to determine what portion of the expenses . . . [defendant] purportedly incurred related to . . . [defendant’s] share of support.” We agree that “[t]he measure of [plaintiff]’s liability to [defendant] is the amount actually expended by [defendant] *which represented the [plaintiff’s] share of support.*” *Hicks*, 34 N.C. App. at 130, 237 S.E.2d at 309 (emphasis added). Here, the trial court awarded defendant 100% of each of the expenses listed pursuant to its award of retroactive child support; this indicates that the trial court failed to allot any portion of the retroactive child support expenses as defendant’s responsibility. In contrast, we note that the trial

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court allocated to defendant 10% of the child's prospective "uninsured medical, dental, optical, orthodontic, therapy, counseling, prescription drug expenses, and any other expenses incurred by the minor child in connection with his healthcare that is not covered by the major medical insurance provider(s);]" we cannot discern from the findings in the order why defendant has responsibility for 10% of these prospective expenses but has no responsibility for the retroactive expenses.

D. Summary as to Retroactive Child Support

In summary, as to the award of retroactive child support, we reverse the award for nursery expenses and maternity clothes prior to the child's birth because there is no legal basis for making such an award. We reverse the award for nursery expenses and basic needs after the birth because there was not sufficient evidence that such expenses were incurred prior to the filing of plaintiff's complaint. We reverse and remand the order as to the expenses for daycare, child care, and birth for the trial court to consider the plaintiff's ability to pay during the time for which reimbursement is sought, how these expenses should be apportioned between plaintiff and defendant, and to make any other findings of fact and conclusions of law necessary to support the award of retroactive child support.

III. Prospective Child Support

[5] Plaintiff next contends that the trial court erred in awarding prospective child support ("child support") because it failed "to [m]ake [s]pecific [f]indings of [f]act [c]oncerning [plaintiff's] [i]ncome and [a]bility to [p]ay [c]hild [s]upport[.]" based its award on plaintiff's income without considering the needs of the child, and abused its discretion in setting defendant's child support obligation and failing to "offset" plaintiff's child support obligation by such amount. Again, we note that we review the child support award to consider if the evidence supports the findings of fact, the findings support the conclusions of law, and the conclusions support the judgment. *See Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49.

North Carolina General Statute § 50-13.4(c) requires the trial court to consider several factors when establishing a child support obligation:

Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child

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care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4 (2011). Plaintiff raises arguments regarding several of these factors and we will address each separately.

A. Plaintiff's Income and Ability to Pay

As to plaintiff's income and ability to pay, the trial court made the following findings of fact:

12. On October 16, 2012, Plaintiff/Father filed an Amended Financial Affidavit listing his average gross monthly income as being \$24,409.66.

....

16. The child support award set forth herein is necessary to meet the reasonable needs of the minor child related to his health, education and maintenance, having due regard to the estates, earning, conditions, accustomed standard of living of the child and of the parties.

....

18. Plaintiff/Father is an able-bodied man who is gainfully employed and fully capable of paying to Defendant/Mother, for the benefit of the minor child, child support in the amount set forth herein.

19. Plaintiff/Father is a cosmetic dentist in Beverly Hills and Los Angeles, California. Plaintiff/Father has served on the faculty at UCLA's School of Dentistry and is a member at Century City Hospital. Plaintiff/Father has also appeared on the ABC shows Extreme Makeover and Average Joe.

20. Plaintiff/Father has the ability to pay the child support ordered herein.

21. Plaintiff/Father is a man with substantial income.

22. Plaintiff/Father's spending is inconsistent with the income reported on his Amended Financial Affidavit.

23. Plaintiff/Father's average monthly spending according to his testimony and his checking account statements for his Chase Checking Accounts ending #8427

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and #8435 reflect that he spends an average of \$88,617.80 per month.

24. At the time of trial, Plaintiff/Father had no credit card debt.

25. Plaintiff/Father owns and pays for two (2) luxury residences in Los Ang[e]les, California at a cost of approximately \$12,000.00 per month.

26. In nine and a half (9 ½) months, Plaintiff/Father spent \$31,322.85 on vacations or an average of \$3,297.14 per month.

27. In two (2) months, Plaintiff/Father spent \$51,000.00 on jewelry, or an average of \$25,500.00 per month.

28. Plaintiff/Father . . . spent \$1,466.78 for alcohol in three (3) days.

. . . .

34. Plaintiff/Father has monthly shared family expenses of \$15,446.54 and monthly individual expenses of \$6,937.00, as reflected on his Amended Financial Affidavit.

. . . .

36. Plaintiff/Father should have a child support obligation of \$7,342.84 per month (\$5,148.84 (1/3 of Plaintiff/Father's shared family expenses) + \$2,194.00 ([the child's individual expenses) = \$7,342.84).

. . . .

38. Plaintiff/Father's child support obligation should be made effective to November 1, 2012.

39. Plaintiff/Father currently has a child support arrearage of \$15,077.52 through January 2013 (\$7,342.84 x 3 months = \$22,028.52 less \$6,951.00 paid = \$15,077.52).

. . . .

44. Plaintiff/Father should pay ninety percent (90%) of the minor child's uninsured medical expenses.

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. . . .

46. The provisions of this Order regarding support of the minor child are fair and reasonable under the existing circumstances.

Only two of these findings address plaintiff's income: finding of fact number 12 which finds that his financial affidavit listed his average gross monthly income as \$24,409.66,³ and finding of fact number 21 which finds that plaintiff "is a man with substantial income."

When a trial court is considering child support outside of the North Carolina child support guidelines, the trial court must make sufficient findings as to the parties' incomes and ability to pay to permit appellate review:

Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case. [N.C. Gen. Stat. § 50-13.4(c)].

. . . .

Where, as here, the trial court sits without a jury, the judge is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment – and the legal conclusions which underlie it – represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

3. This "finding of fact" is actually a recitation of evidence and not a finding by the trial court; this is apparent from the fact that the trial court ultimately determined that plaintiff has more income than what he listed on his affidavit.

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Under G.S. 50-13.4(c), quoted *supra*, an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual findings specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, [and] accustomed standard of living of both the child and the parents. It is a question of fairness and justice to all concerned. In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. It is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.

Coble v. Coble, 300 N.C. 708, 711-13, 268 S.E.2d 185, 189 (1980) (citations and quotation marks omitted); *see also Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49.

In *Coble*, the trial court had found that the “plaintiff is in need of financial assistance for the support of the minor children and that defendant is capable of providing such assistance.” *Id.* at 713, 268 S.E.2d at 189. Our Supreme Court noted that “[t]his finding is more properly denominated a conclusion of law, since it states the legal basis upon which defendant’s liability may be predicated under the applicable statutes, G.S. 50-13.4(b) and (c). As a conclusion of law, it must itself be based upon supporting factual findings.” *Id.* (quotation marks omitted). The Court then determined that the findings of fact failed to support the conclusion, since the only relevant finding of fact was that the:

[d]efendant’s monthly net income is approximately \$483.32, plus an indeterminable amount earned from overtime work, and yet her monthly expenses are approximately \$510.00. To the degree that this finding indicates that defendant’s living expenses tend to exceed her average income, it would seem to negate, rather than support, the conclusion that she is capable of providing support payments. Moreover, the next part of finding No. 12 shows

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that although the monthly financial needs of the children average approximately \$432.00, plaintiff's net monthly income is approximately \$825.00. Far from supporting the conclusion that plaintiff is in need of partial assistance in meeting his support obligation, this part of the finding suggests instead that he is capable of sufficiently providing for his children on his own. On the face of the order alone, therefore, finding No. 12 does not support the trial court's conclusions as to either plaintiff's financial need for support assistance or defendant's financial ability to provide it. In the absence of other findings which support these conclusions, then, the order awarding plaintiff partial child support cannot be sustained.

Id. (quotation marks omitted).

In the case before us, the trial court's findings of fact are of similar import. *Compare id.* Again, only two of the trial court's findings address plaintiff's income: finding of fact number 12 which finds that his financial affidavit listed his average gross monthly income as \$24,409.66, and finding of fact number 21 which finds that plaintiff "is a man with substantial income." There is no finding of fact as to plaintiff's actual income, only that it is "substantial[.]" We can infer that "substantial" here means more than \$24,409.66 but we cannot, determine what the trial court found plaintiff's income to be. Furthermore, the trial court found that although plaintiff claims to earn \$24,409.66 on average per month, he actually spends an average of \$88,617.80 per month. Here, the trial court clearly assumed that the plaintiff's income is quite significantly more than \$25,000 per month, but we have no way of knowing what number the trial court had in mind.⁴

4. Plaintiff also implies that the trial court imputed income to him due to what it may have found to be extravagant expenditures. We do not believe this is so, but if the trial court was actually imputing income to plaintiff, this would be error, as there were no findings of fact that that defendant was suppressing his income intentionally or spending excessively to avoid his child support obligation. *See generally Respass v. Respass*, __ N.C. App. __, __, 754 S.E.2d 691, 703-04 (2014) (addressing defendant's argument that the trial court erred in the basis of income it imputed to him: "Generally, a party's ability to pay child support is determined by that party's actual income at the time the award is made. A party's capacity to earn may, however, be the basis for an award where the party deliberately acted in disregard of his obligation to provide support. Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities[.] This showing may be met by a sufficient degree of indifference to the needs of a parent's children." (citation, quotation marks, ellipses, and brackets omitted)). While certainly the trial court may find plaintiff's evidence not to be credible, the trial court must still make an actual finding as to plaintiff's income.

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Normally, findings as to the incomes of the parties are stated in monetary amounts of dollars per month or year. Although these numbers might even be averages or approximations, particularly when a parent does not receive a set monthly paycheck, a finding of an actual monetary amount of income will permit this Court to review the findings based upon the evidence.⁵ While the trial court did give some regard “to the estates, earnings, conditions, accustomed standard of living of the” parties, it failed to make a finding of fact as to plaintiff’s income which is definite enough for this Court to review. N.C. Gen. Stat. § 50-13.4(c). Furthermore, while the trial court specifically found plaintiff was able to pay the child support ordered, the income the trial court was basing this finding on is unclear, and thus leaves this Court also unable to review the finding of plaintiff’s ability to pay.

In addition, even though the trial court’s order contained some findings as to “the estates[,]” N.C. Gen. Stat. § 50-13.4(c), of the parties, particularly plaintiff, it did not make any findings which would permit consideration of plaintiff’s estate as supporting his ability to pay child support; rather, the findings of fact addressed only the expenses plaintiff has incurred. For example, the trial court found that “Plaintiff/Father owns and pays for two (2) luxury residences in Los Ang[e]les, California at a cost of approximately \$12,000.00 per month.” Having a large house payment does not necessarily equate to having a substantial estate; it can mean just the opposite. The trial court did not find the value of these “luxury residences[,]” whether plaintiff’s indebtedness on these residences equals or exceeds their values, or any other facts regarding the net value of plaintiff’s estate.

Accordingly, we reverse and remand the award of prospective child support for the trial court to make findings as to the monetary value of plaintiff’s income and any other findings of fact or conclusions of law necessary to set an appropriate child support amount. We note that plaintiff also makes arguments as to the specific evidence the trial court should rely upon on remand in making its determination as to what his income is, but we will not address this, since arguments about which evidence should weigh more heavily are properly directed to the trial

5. We also note that without an actual monetary number for the income it could be difficult for either party to prove the need for a modification of child support in the future based upon a change in circumstances, as the trial court would have to determine what the plaintiff’s “substantial” income actually was in 2012 and whether any alleged change in the plaintiff’s income would be sufficient to support modification. *See generally* N.C. Gen. Stat. § 50-13.7(a) (2011) (“Except as otherwise provided in G.S. 50-13.7A, an order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party[.]”)

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court, which has the discretion to determine the credibility and the weight of the evidence. *See Coble*, 300 N.C. at 712-13, 268 S.E.2d at 189.

B. Reasonable Needs of the Child

[6] While we are reversing and remanding the child support award for the reasons noted above, plaintiff also has argued that the trial court failed to consider the child's actual needs in setting the amount of child support. The child support ordered in the amount of \$7,342.84 per month far exceeds the actual needs of the child based upon the child's historical individual expenditures as found by the trial court, which were \$2,194.00 per month. Although the trial court has the discretion to award child support in excess of actual historical expenses based upon plaintiff's financial position, the findings of fact as to how this amount was established must be detailed enough to permit review:

Whatever may have been the rule at common law, a father's duty of support today does not end with the furnishing of mere necessities if he is able to afford more. In addition to the actual needs of the child, a father has a legal duty to give his children those advantages which are reasonable considering his financial condition and his position in society.

In *Hecht v. Hecht*, 189 Pa. Super. 276, 283, 150 A.2d 139, 143, Woodside, J., observed:

Children of wealthy parents are entitled to the educational advantages of travel, private lessons in music, drama, swimming, horseback riding, and other activities in which they show interest and ability. It is possible that a child with nothing more than a house to shelter him, a coat to keep him warm and sufficient food to keep him healthy will be happier and more successful than a child who has all the advantages, but most parents strive and sacrifice to give their children advantages which cost money. Much of the special education and training which will be of value to people throughout life must be given them when they are young, or be forever lost to them.

What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties. Things which might

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properly be deemed necessities by the family of a man of large income would not be so regarded in the family of a man whose earnings were small and who had not been able to accumulate any savings. In determining that amount which is reasonable, the trial judge has a wide discretion with which this court will not interfere in the absence of a manifest abuse.

It is never the purpose of a support order to divide the father's wealth or to distribute his estate. Furthermore, even though the father be a man of great wealth, an excessive award which would encourage extravagant expenditures either by the child or in his behalf would not be in his best interest.

Williams v. Williams, 261 N.C. 48, 57-58, 134 S.E.2d 227, 234 (1964) (citations, quotation marks, and ellipses omitted); *Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49.

The trial court's order seems to "divide the father's wealth" by basing child support upon a number calculated by adding one-third of plaintiff's "shared family expenses" to the child's historical individual expenses. *Id.* at 58, 134 S.E.2d at 234. The order also finds that plaintiff resides in Los Angeles, California, but fails to make any findings of fact as to how plaintiff's expenses incurred in California, which apparently do not include any child-related expenditures, relate to the expenses of raising a child, even the child of a wealthy parent, in Charlotte, North Carolina.

A child support award can be made by using estimates of needs based upon the higher standard of living made possible by plaintiff's means, but the trial court must make findings of fact which assign a monetary value to these needs. *See Payne v. Payne*, 91 N.C. App. 71, 75, 370 S.E.2d 428, 431 (1988) ("Although an equation for child support does not lend itself to an exact mathematical calculation, it is difficult, if not impossible, to know whether a trial judge has made a complete and reasonable assessment of the child's needs and the parties' abilities to pay when the needs-variable has no monetary value."). As such, upon remand we also instruct the trial court to make findings of fact, specifically with monetary values, as to the child's reasonable needs in light of the abilities of the parents to provide support.

C. Defendant's Child Support Obligation

[7] The trial court found defendant's portion of responsibility for support of the minor child to be \$100.00 per month, which plaintiff argues is

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too low, but at the very least should offset his own obligation by \$100.00. But the order does not state that the total child support obligation of both parents is \$7,342.84 per month, but rather that “Plaintiff/Father should have a child support obligation of \$7,342.84 per month[,]” and thus we see no merit in his argument that his child support obligation should be reduced by defendant’s child support obligation. But, as discussed above, we are reversing and remanding the child support award for several reasons, and on remand the trial court should take into account, in a manner this Court can review, “the estates, earnings, conditions, accustomed standard of living” of *both* parties in calculating the child support obligation. N.C. Gen. Stat. § 50-13.4(c); *see Coble v. Coble*, 300 N.C. at 712, 268 S.E.2d at 189. The trial court found unchallenged that defendant did have an income, and the trial court must consider the relative abilities and financial circumstances of both parties; though plaintiff’s earnings and estate may be far greater than defendant’s, defendant’s circumstances must also be taken into account. *See* N.C. Gen. Stat. § 50-13.4(c); *Coble v. Coble*, 300 N.C. at 712, 268 S.E.2d at 189.

But despite the need for findings with monetary amounts for incomes and expenses, we acknowledge that not all of the factors under North Carolina General Statute § 50-13.4(c) can be quantified. *See* N.C. Gen. Stat. § 50-13.4(c). The trial court is directed to take into account “the child care and homemaker contributions of each party, and other facts of the particular case[.]” in setting child support; *id.*, these factors are less susceptible to descriptions in monetary terms. Particularly, in a case such as this, where plaintiff lives thousands of miles away and has no role at all in the child’s daily care and life, it is appropriate for the trial court to consider the fact that defendant bears 100% of the daily responsibilities of child care and making a home for the child. *See id.* Only defendant will make the daily physical and emotional sacrifices required to raise a child. All the law requires of plaintiff is to make a monthly payment. If the trial court does consider defendant’s non-monetary, but truly priceless, contributions, it should make findings of fact regarding those contributions so that its use of this factor may be reviewed on appeal. *See Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49.

D. Summary of Prospective Child Support

In summary, we reverse the trial court’s award for child support and remand for the trial court to make specific findings of fact, including plaintiff’s income stated in a monetary value, plaintiff’s ability to pay, the child’s reasonable needs stated in a monetary value, and to make any further findings of fact or conclusions of law that would be necessary

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to set support obligations for both parties in a manner that would be reviewable by this Court.

IV. Attorney Fees

[8] Lastly, plaintiff argues that the trial court erred in awarding attorney fees to defendant. Plaintiff challenges the finding of facts supporting the award.

A. Finding Regarding Refusal to Provide Support

In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding[.]

N.C. Gen. Stat. § 50-13.6 (2011). "Whether these statutory requirements have been met is a question of law, reviewable on appeal. Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded." *Simpson v. Simpson*, 209 N.C. App. 320, 323, 703 S.E.2d 890, 892 (2011) (citations and quotations omitted).

Plaintiff contends,

[t]he trial court made no finding [he] "refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." It is well established that in a child support, action, this finding is a necessary prerequisite to an award of attorneys' fees. *Hudson*, 299 N.C. at 472-73, 263 S.E.2d at 723-24.

Indeed,

[b]efore a court may award fees in an action solely for child support, the court must make the required finding under the second sentence of the statute: that the party required to furnish adequate support failed to do so when the action was initiated. *On the other hand, when the*

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proceeding or action is for both custody and support, the court is not required to make that finding.

Spicer v. Spicer, 168 N.C. App. 283, 296, 607 S.E.2d 678, 687 (2005) (emphasis added) (citation omitted). Plaintiff thus contends that his action was only an action for support.

Plaintiff, citing *Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E.2d 199 (1984), argues that “the mere fact a lawsuit includes claims for support and custody does not convert a proceeding into one for both custody and support where custody is not contested.” Plaintiff then directs our attention to the fact that both parties agreed from the outset of this case that defendant would have sole legal and physical custody of the child. However, *Gibson* states,

the issue of custody had been settled in *Hudson* by a consent order entered twenty months prior to the order concerning the child support while here the issue of custody, though uncontested, was settled by the judgment of the court some five months prior to the entry of the child support judgment. *What appears to be important, however, is not how the custody issue was settled or when but that it was settled and was not at issue when the judgment concerning support was entered.*

Gibson, 68 N.C. App. at 574, 316 S.E.2d at 105 (emphasis added).

Here, the order being appealed from is entitled “ORDER (RE: PERMANENT CHILD CUSTODY AND CHILD SUPPORT)[.]” Furthermore, unlike in *Hudson* and *Gibson*, *see id.*, the order on appeal is the first and only order that grants legal and physical custody of the child to defendant. Although plaintiff and defendant may have believed and acted as though they had resolved the custody claims before entry of the order, custody was still at issue when the case was called for hearing and was not addressed by the trial court until its final order which also addresses child support. Custody was therefore “at issue when the judgment concerning support was entered[.]” *id.*, so this was an action for custody and support, and the trial court was not required to find that plaintiff had refused to provide prior support to the child. *See* N.C. Gen. Stat. § 50-13.6; *Spicer*, 168 N.C. App. at 296, 607 S.E.2d at 687.

B. Other Findings of Fact

Lastly, plaintiff contends that “[t]he trial court’s findings of fact do not support the amount of its award of attorneys’ fees” because “the trial court made no findings as to the actual hours spent or what any of

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the three lawyers representing . . . [defendant] did or the time they spent on the case, or the reasonableness of the work or time spent” or defendant’s attorneys’ “skill or experience.” Plaintiff again also notes that the failure of the trial court to find his income meant it could not rightfully find he had the ability to pay the attorney fees. We disagree.

The trial court reviewed the attorney fee affidavits and found the fees to be “necessary and reasonable[;]” the trial court also made several findings of fact regarding defendant’s attorney fees including, the necessity and reasonableness of the fees, the attorney’s rate, that the rate is reasonable as compared to others with like experience and skill, the “reasonable rates” of others in the firm who assisted on the case, and the total amounts charged. We conclude that the trial court made sufficient findings of fact to support the award of attorney fees.

Regarding plaintiff’s ability to pay the award of attorney fees, plaintiff has cited no authority requiring the trial court to find he is able to pay defendant’s attorney fees. North Carolina General Statute § 50-13.6 provides in relevant part simply that

[i]n an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney’s fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit[;]

N.C. Gen. Stat. § 50-13.6, the statute has no requirement that the trial court also find that the party being ordered to pay these fees have the ability to pay, and although some cases have mentioned an obligor’s ability to pay, we have found no requirement that a trial court make this finding of fact. North Carolina General Statute § 50-13.6 places this matter in the trial court’s discretion, *see id.*, and plaintiff has failed to demonstrate an abuse of discretion as to the trial court’s attorney fee award.

C. Summary of Attorney Fees

In summary, we affirm the trial court’s award for attorney fees.

V. Conclusion

In conclusion, for the award of retroactive child support, we reverse the award for nursery expenses and maternity clothes prior to the child’s birth because there is no legal basis for making such an award;

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we reverse the award for nursery expenses and basic needs after the birth because there was not sufficient evidence that such expenses were incurred prior to the filing of plaintiff's complaint; and we reverse and remand the order as to the expenses for daycare, child care, and birth for the trial court to consider the plaintiff's ability to pay during the time for which reimbursement is sought and how these expenses should be apportioned between plaintiff and defendant. As to the award of prospective child support, we reverse the trial court's award for child support and remand for the trial court to make specific findings of fact, including plaintiff's income stated in a monetary value, plaintiff's ability to pay, the child's reasonable needs stated in a monetary value, and to make any further findings of fact or conclusions of law that would be necessary to set support obligations for both parties in a manner that would be reviewable by this Court. As to the award of attorney fees, we affirm.

AFFIRMED in part, REVERSED in part, and REMANDED.

Judges McGEE and BRYANT concur.

RON D. MEYER, PLAINTIFF-APPELLANT
v.
RACE CITY CLASSICS, LLC, DEFENDANT-APPELLEE

No. COA13-1371

Filed 29 July 2014

Jurisdiction—personal—North Carolina Corporation—Nebraska judgment

A foreign judgment from Nebraska involving the purchase of a classic car was valid and enforceable in North Carolina where the Nebraska trial court properly exercised personal jurisdiction over the North Carolina defendant. Defendant intentionally directed its actions towards Nebraska, plaintiff's inability to use and enjoy the car resulted from defendant's contacts with Nebraska, it was foreseeable that any hindrance to plaintiff's use and enjoyment of the car caused by defendant's misrepresentations would occur in Nebraska, and defendant could reasonably have anticipated being haled into court in Nebraska. Defendant did not show that defending the suit

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in Nebraska would have been unduly burdensome to the extent that it would offend notions of fair play and substantial justice.

Appeal by Plaintiff from order entered 21 October 2013 by Judge H. Thomas Church in District Court, Iredell County. Heard in the Court of Appeals 7 April 2014.

Pope McMillan Kutteh & Schieck, P.A., by William H. McMillan and Matthew J. Pentz, for Plaintiff-Appellant.

Homesley, Gaines & Dudley, LLP, by Edmund L. Gaines and Leah Gaines Messick, for Defendant-Appellee.

McGEE, Judge.

Ron D. Meyer (“Plaintiff”) saw a 1970 Ford Mustang (“the car”) in an advertisement placed by Race City Classics, LLC, (“Defendant”) on the website classiccars.com in July of 2012. Defendant is a business, located in Iredell County, that specializes in the consignment and sale of classic cars. Defendant also placed advertisements on carsforsale.com, on eBay, and on its own website. Plaintiff, a resident of Nebraska, contacted Defendant and, through a series of telephone calls and emails, Plaintiff and Defendant reached an agreement whereby Plaintiff would pay Defendant \$21,000.00 to purchase the car. Thomas M. Alphin (“Alphin”), one of Defendant’s owners, handled the negotiations for Defendant. Plaintiff wired the full amount of \$21,000.00 to Defendant. Plaintiff did not come to North Carolina at any time during the negotiation and purchase transaction. Plaintiff wanted the car shipped to his home in Nebraska, telling Defendant that Plaintiff planned to present the car at vehicle car shows in Nebraska.

Alphin sent Plaintiff an email in which Alphin stated: “I lined up a shipper, and he will give me the price tomorrow.” In a subsequent email to Plaintiff, Alphin stated:

I have the shipping lined up and it is something I can’t control. They put it out and have a driver accept the bid and they come and get it. I had it on multiple sites looking for the best quote, and Alpine was the best so I went ahead and booked it for you. I paid \$380, so your cost is \$345.

The car was delivered to Plaintiff in Nebraska, but Plaintiff was dissatisfied with the condition of the car. Plaintiff requested that Defendant refund the purchase price, but Defendant refused.

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Plaintiff filed an action for damages against Defendant in Nebraska state court. Plaintiff contended that, upon receipt of the car, the “paint on the car was cracked at various spots, the front hood was out of alignment, the trunk could not be opened and the car could not be started.” Defendant, after being served with notice of the action, failed to appear to contest Plaintiff’s claims and the Nebraska court entered a default judgment against Defendant in the amount of \$8,942.30 on 26 February 2013. That was the amount the Nebraska court found necessary to repair the problems alleged by Plaintiff.

Pursuant to N.C. Gen. Stat. § 1C-1703, Plaintiff filed a “Docketing of Foreign Judgment” and the default judgment from the Nebraska state court in Iredell County Superior Court on 30 May 2013. Plaintiff also filed, pursuant to N.C. Gen. Stat. § 1C-1704, a “Notice of Filing Foreign Judgment” on the same day. Pursuant to N.C. Gen. Stat. § 1C-1705(a), Defendant filed a “Motion for Relief Against Foreign Judgment” on 18 June 2013, contending the Nebraska court lacked personal jurisdiction over Defendant. Pursuant to N.C. Gen. Stat. § 1C-1705(b), Plaintiff then filed a “Motion for Enforcement of Foreign Judgment” on 8 July 2013. At a 21 October 2013 hearing, the trial court found Defendant did not have sufficient minimum contacts with the State of Nebraska to confer personal jurisdiction over Defendant to the State of Nebraska. The trial court granted Defendant’s “Motion for Relief Against Foreign Judgment” and set aside the docketing of the State of Nebraska foreign judgment. Plaintiff appeals.

I. Standard of Review

In questions of personal jurisdiction, this Court “considers only ‘whether the findings of fact by the trial court are supported by competent evidence in the record;’ . . . we are not free to revisit questions of credibility or weight that have already been decided by the trial court.” *Deer Corp v. Carter*, 177 N.C. App. 314, 321, 629 S.E.2d 159, 165 (2006) (citation omitted). “If the findings of fact are supported by competent evidence, we conduct a *de novo* review of the trial court’s conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant’s due process rights.” *Id.* at 321-22, 629 S.E.2d at 165.

II. Analysis

Defendant’s Motion for Relief Against Foreign Judgment

Plaintiff argues that the trial court erred in granting Defendant’s motion for relief from the Nebraska foreign judgment because Nebraska

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courts had personal jurisdiction over Defendant for the cause of action arising out of the sale of the car.

Generally, one state must accord full faith and credit to a judgment rendered in another state. However, because a foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the foreign judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit.

To meet the requirements of a valid judgment, the rendering court must comport with the demands of due process such that it has personal jurisdiction — otherwise known as minimum contacts — over defendant. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945). The Due Process Clause protects an individual's liberty interest in not being subject to the judgment of a forum with which he has established no meaningful contacts or relations. *Id.* "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490 (1980). N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) allows a party to petition for relief from judgment on the grounds that the judgment is void. A void judgment is a legal nullity which may be attacked at any time.

Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc., 113 N.C. App. 476, 478-79, 439 S.E.2d 221, 223-24 (1994) (some citations omitted). This Court has held that, in actions to enforce a foreign judgment, the burden of proof on the issue of full faith and credit is on the judgment creditor. *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 300, 429 S.E.2d 435, 438 (1993). The introduction into evidence of a copy of the foreign judgment, authenticated pursuant to N.C. Gen. Stat. § 1A-1, Rule 44, establishes a presumption that the judgment is entitled to full faith and credit. *Lust*, 110 N.C. App. 298 at 301, 429 S.E.2d 435 at 437 (citing *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d, 397, 400 (1967)). "This presumption can be rebutted by the judgment debtor upon a showing that the rendering court . . . did not have jurisdiction over the parties[.]" *Id.*

In the present case, Plaintiff filed an authenticated judgment in the Office of the Clerk of Superior Court of Iredell County. Therefore,

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Defendant, as the judgment debtor, had the burden of presenting evidence to rebut the presumption that the judgment was valid. We agree with Plaintiff that Defendant has not done so.

Nebraska courts perform a two-step analysis when determining whether a state court's exercise of personal jurisdiction over a defendant is constitutional. *Quality Pork Intern. v. Rupari Food Services, Inc.*, 267 Neb. 474, 480, 675 N.W.2d 642, 649 (2004). First, Nebraska's long-arm statute must authorize the exercise of personal jurisdiction over a defendant. *Id.* Second, the trial court must consider whether minimum contacts exist between the defendant and the forum state and whether such personal jurisdiction may be exercised over the defendant without offending constitutional due process. *Id.*

In the present case, this Court must determine whether Nebraska's long-arm statute authorized personal jurisdiction over Defendant. Neb. Rev. Stat. § 25-536 (1983) reads:

A court may exercise personal jurisdiction over a person:

(1) Who acts directly or by an agent, as to a cause of action arising from the person:

(a) Transacting any business in this state;

(b) Contracting to supply services or things in this state;

(c) Causing tortious injury by an act or omission in this state;

(d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(e) Having an interest in, using, or possessing real property in this state; or

(f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or

(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

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Subsection (2) of the above statute “expressly extends Nebraska’s jurisdiction over nonresidents as far as the U.S. Constitution permits.” *Crete Carrier Corp. v. Red Food Stores, Inc.*, 254 Neb. 323, 328, 576 N.W.2d 760, 764 (1998) (citing *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998)). Therefore, we need only address whether Defendant had such minimum contacts with Nebraska that the exercise of personal jurisdiction would not offend federal constitutional principles of due process. *Id.* Depending on the quality and nature of Defendant’s contacts with Nebraska, Nebraska’s courts may have either general or specific personal jurisdiction over Defendant. *Quality Pork*, 267 Neb. at 482-83, 675 N.W.2d at 650.

Due process for personal jurisdiction over a nonresident defendant requires that the defendant’s minimum contacts with the forum state be such that “maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (citing *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)). The Due Process Clause “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *Burger King v. Rudzewicz* 471 U.S. 462, 472, 85 L. Ed. 2d 528, 540 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)).

In *Burger King*, the United States Supreme Court further held that individuals have fair warning that a particular activity may subject them to a foreign state’s specific jurisdiction if the defendant had “purposefully directed” his activities at residents of the forum, and the litigation resulted from alleged injuries that “ar[ose] out of or relate[d] to” those activities. *Burger King*, 471 U.S. at 472, 85 L. Ed. 2d at 540-41 (citations omitted). Even when the cause of action does not arise out of or relate to a defendant’s activities in the forum state, the state may exercise general jurisdiction over the defendant when there are sufficiently continuous and systematic contacts between the state and the defendant. *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 414-15, 80 L. Ed. 2d 404, 411-12.

Defendant argues that sufficient minimum contacts do not exist for Nebraska state courts to exercise general personal jurisdiction over him because “[t]he sale to this Nebraska resident happened one time, and did not create any sort of systematic or continuous relationship with the state.” We agree that Defendant’s conduct in this instance was

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insufficient to allow Nebraska to obtain general personal jurisdiction over Defendant.

However, the cause of action arose out of Defendant's contact with Nebraska, and we hold that the quality and nature of Defendant's contacts were such that the contacts conferred specific personal jurisdiction over Defendant in Nebraska state courts. Plaintiff first saw the car indirectly through an advertisement Defendant placed on classiccars.com, and Plaintiff and Defendant entered into extensive negotiations for the car immediately after Plaintiff contacted Defendant on 15 July 2012. The negotiations lasted for three days and took place through a series of telephone calls and emails. During these discussions, Alphin told Plaintiff, both verbally and in emails, that everything in the car worked as it should, and that the car "sounded and drove great." Plaintiff told Alphin that Plaintiff intended to present the car at car shows in Nebraska. Plaintiff and Defendant agreed to split the cost of shipment of the car. Plaintiff and Alphin now disagree as to who was responsible for hiring the shipping company. Plaintiff contends that pursuant to agreement of the parties, Alphin handled all the shipping logistics. The emails in the record indicate that Alphin handled the logistics of the car's shipment. Defendant accepted the wire transfer of \$21,000.00 from Plaintiff, who resided in Nebraska, as payment for the car.

It logically follows that Alphin knew that if Plaintiff's ability to use and enjoy the car was impaired, such impairment would likely occur in Nebraska. By directing these activities towards Nebraska, Defendant could reasonably have anticipated being haled into court in Nebraska if the car was defective and the quality was less than represented by Defendant. *World-Wide*, 444 U.S. at 297, 62 L. Ed. 2d. at 501.

Furthermore, a single contract is a sufficient contact for due process purposes, even if the defendant has not physically entered the forum state, as long as the contract has a substantial connection to the forum state. *McGee v. Int'l Life Insurance Co.*, 355 U.S. 220, 223, 2 L. Ed. 223, 226 (1957). In *McGee*, a single life insurance contract was sufficient to confer personal jurisdiction over the defendant in California, despite the fact that the defendant had no other contracts in California, did not market its services there, and never had its agents physically enter the state in the course of their employment. *McGee*, 355 U.S. at 222, 2 L. Ed. at 225.

The North Carolina Supreme Court followed this rule in *Williamson Produce, Inc. v. J.H. Satcher, Jr.*, holding: "When a contract bears a substantial connection to the forum state, a defendant who enters into that contract 'can reasonably anticipate being haled into court . . .' in

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the forum state.” *Williamson Produce, Inc. v. J.H. Satcher, Jr.*, 122 N.C. App. 589, 594, 471 S.E.2d 96, 99 (1996) (citations omitted). In *Williamson Produce*, the plaintiff initiated negotiations in South Carolina with the defendant, a South Carolina peach farmer. *Id.* at 589, 471 S.E.2d at 97. The plaintiff travelled to South Carolina, where the plaintiff finalized a contract with the defendant to sell the defendant’s peaches in North Carolina. *Id.* at 590, 471 S.E.2d at 96. When the defendant breached the contract, the plaintiff sued the defendant in North Carolina. *Id.* at 591, 471 S.E.2d at 97. Since the defendant contracted with the plaintiff to have his peaches sold in North Carolina, the contract bore a substantial connection to North Carolina and the defendant “should not be surprised with being haled into a North Carolina court.” *Id.* at 594, 471 S.E.2d at 99 (citation omitted).

In the present case, Plaintiff initiated the negotiations with Defendant for the purchase of the car. Defendant did not physically enter Nebraska, but it contracted with Plaintiff, a Nebraska resident, to sell the car to Plaintiff and have it shipped to Plaintiff’s residence in Nebraska. Payment for the car was sent from Plaintiff in Nebraska. Defendant knew Plaintiff intended to show the car at car shows in Nebraska. These aspects of the contract show that the contract had a substantial connection to Nebraska. Therefore, Defendant should not be surprised to have been haled into a Nebraska court when Plaintiff alleged the car was not as Defendant had represented. Defendant’s constitutional right to due process was not violated by Plaintiff’s action having been initiated in Nebraska.

Defendant argues that because he was never physically in Nebraska, never paid a sales tax in Nebraska, never attended meetings in Nebraska, and never purchased a car in Nebraska, the Nebraska state court lacked personal jurisdiction over him. However, in the above mentioned *McGee* case, the defendant did not physically enter the forum state, did not advertise directly to residents of the forum state, nor did it have any other contracts with residents of the forum state. *McGee*, 355 U.S. at 222, 2 L. Ed. at 225. Yet the forum state’s exercise of personal jurisdiction over the defendant in *McGee* was upheld as constitutional. *Id.*

In *Quality Pork*, the Nebraska Supreme Court found that personal jurisdiction existed over Rupari Food Services, Inc. (“Rupari”), a Florida corporation, despite the fact that Rupari had never made any sales into or directly to the State of Nebraska and none of its employees or officers had ever visited Nebraska in the course of their employment with Rupari. *Quality Pork*, 267 Neb. at 478, 675 N.W.2d at 647. Rupari had

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contracted to pay for three shipments of Quality Pork's products to Star Food Processing, Inc., a Texas corporation. *Id.* at 477, 675 N.W.2d at 646. Rupari failed to pay for one of the orders, and Quality Pork, a Nebraska corporation, filed an action in Nebraska state court to recover the cost of the third order. *Id.* at 477, 675 N.W.2d at 647.

In its conclusion in *Quality Pork*, the Nebraska Supreme Court stated:

Quality Pork's claim arose out of Rupari's contacts with a company located in Nebraska. Therefore, in evaluating whether the exercise of specific personal jurisdiction is reasonable, we conclude that it would not be unduly burdensome for Rupari to defend an action in Nebraska. Quality Pork had a valid interest in obtaining convenient and effective relief which supported the bringing of its action in this state. By purposefully conducting business with Quality Pork, Rupari could reasonably anticipate that it might be sued in Nebraska if it failed to pay for products ordered from Quality Pork.

Id. at 484-85, 675 N.W.2d at 652.

Similarly, in the present case, Defendant could reasonably anticipate being sued in Nebraska if the car Defendant delivered to Plaintiff was alleged to be not of the quality represented by Defendant to Plaintiff. Plaintiff had a valid interest in obtaining convenient and effective relief, and Defendant presented no evidence to show that defending the lawsuit in Nebraska would be unduly burdensome or that doing so would violate notions of fair play and substantial justice. *Internat. Shoe*, 326 U.S. at 316, 90 L. Ed. at 102.

Finally, case law from this Court, on enforcement of foreign judgments, supports a finding that Nebraska state courts have personal jurisdiction over Defendant. In *Automotive Restyling Concepts, Inc. v. Central Service Lincoln Mercury, Inc.*, Automotive Restyling Concepts, Inc. ("Automotive"), a Virginia corporation, contracted with Central Service Lincoln Mercury ("Central"), a North Carolina corporation, to restyle four of Central's used cars on Automotive's Virginia premises. *Automotive Restyling Concepts Inc. v. Central Service Lincoln Mercury, Inc.*, 92 N.C. App. 372, 373, 374 S.E.2d 399, 400 (1988). The contract was negotiated and agreed to in North Carolina. *Id.* One of Automotive's employees came to North Carolina and transported the cars to Virginia. *Id.* The cars were restyled in Virginia, but Central was dissatisfied and refused to pay its bill. *Id.* at 374, 374 S.E.2d at 400.

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Automotive sued Central in Virginia state court, and a default judgment was entered against Central. *Id.* Automotive filed the judgment in a North Carolina district court, which upheld the judgment. *Id.* Our Court stated that, for a foreign judgment against a nonresident to be valid, the trial court must be authorized by statute to exercise jurisdiction over the nonresident defendant, and the exercise of jurisdiction must be in accord with the constitutional limits of due process. *Id.* This Court affirmed the trial court's order, holding that the requirements for jurisdiction in Virginia had been met. *Id.* This Court concluded: "Having voluntarily availed itself of the privilege of having its cars improved and restyled in Virginia, that state's enforcement of defendant's obligation to pay for the services so obtained was to be expected." *Id.* at 375, 374 S.E.2d at 401; *see also Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc.*, 140 N.C. App. 521, 537 S.E.2d 227 (2000).

Defendant argues the present case is different from *Automotive Restyling* because less of the contract in this case was performed in the foreign state than in *Automotive Restyling*. We find that argument unpersuasive. In both cases, the defendant did not physically enter the state in which judgment was entered. Each contract was fulfilled in the state foreign to each defendant. In *Automotive Restyling*, the contract was fulfilled by the restyling of the four cars in Virginia. In the present case, the contract was fulfilled by the delivery of the car to Plaintiff in Nebraska.

We hold that the trial court in Nebraska properly exercised personal jurisdiction over Defendant. Defendant intentionally directed its actions towards Nebraska through: (1) advertising its cars on websites accessible to Nebraskans, (2) its contract negotiations with Plaintiff, (3) receiving Plaintiff's payment from Nebraska, and (4) shipment of the car to Plaintiff in Nebraska. Plaintiff's inability to use and enjoy the car resulted from Defendant's contacts with Nebraska. It was foreseeable that any hindrance to Plaintiff's use and enjoyment of the car caused by Defendant's misrepresentations would occur in Nebraska. As such, Defendant could reasonably have anticipated being haled into court in Nebraska. Defendant did not show that defending the suit in Nebraska would have been unduly burdensome to the extent that it would offend notions of fair play and substantial justice. We hold that the foreign judgment from the Nebraska state court is valid and enforceable in North Carolina.

Reversed and remanded.

Chief Judge MARTIN and Judge CALABRIA concur.

OSBORNE v. TOWN OF NAGS HEAD

[235 N.C. App. 121 (2014)]

HUGH OSBORNE AND TERESA OSBORNE, PETITIONERS

v.

TOWN OF NAGS HEAD, ET AL., RESPONDENTS

No. COA13-1122

Filed 15 July 2014

Zoning—Board of Adjustment—motion to reconsider—majority vote

The Nags Head Board of Adjustment (BOA) was without authority to consider the merits of a motion to reconsider a zoning variance where the chair of the BOA mistakenly ruled that a motion to deny reconsideration had failed because the vote to deny did not reach the needed 4/5 majority. Under both the North Carolina General Statutes and the Nags Head Town Code, the vote was sufficient to deny the motion to reconsider; a 4/5 vote was needed to grant a variance, but the BOA was not voting on a motion to grant a variance. Moreover, the failure to deny a negative proposition was not the same as adopting a positive proposition.

Appeal by petitioners from order entered 16 April 2013 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 18 March 2014.

Vandeventer Black LLP, by Norman W. Shearin, Wyatt M. Booth, and Ashley P. Holmes for petitioner-appellants.

Hornthal, Riley, Ellis & Maland, L.L.P., by Benjamin M. Gallop and John D. Leidy, for respondent-appellee.

STEELMAN, Judge.

Where the Board of Adjustment voted to deny petitioners' motion to reconsider, it lacked jurisdiction to consider the merits of that motion.

I. Factual and Procedural Background

In 1997, the owner of Lot 30 of the Hills of Nags Head subdivision in the Town of Nags Head requested a variance from the Town of Nags Head Board of Adjustment (BOA), which would permit the use of a shared driveway with an adjoining lot in the subdivision, Lot 29. At the time, the two lots were owned by the same entity. The owner contended that the topography of the land made it impossible to construct a single

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family residence on the property within the setback requirements of the ordinance, and proposed the variance as a solution. BOA found that the zoning restrictions created an unnecessary hardship and granted the variance. After the granting of the variance, neither lot was developed. Subsequently, the lots were acquired by different owners.

In 2012, Hugh and Teresa Osborne (Osbornes) sought to purchase Lot 30 from Gateway Bank. The contract to purchase the property was contingent upon receiving a variance from BOA for their development plan, which would include a single driveway entirely on Lot 30, a shorter driveway than that proposed in 1997, and a smaller size dwelling than was proposed in 1997.

On 13 March 2012, the Osbornes applied to BOA for a variance to eliminate the shared driveway under the 1997 variance. On 24 April 2012, BOA denied this request and refused to modify the terms of the 1997 variance. BOA concluded that, while the ordinance did create an unnecessary hardship, reasonable use of the property could still be had pursuant to the 1997 variance. The Osbornes appealed this order in a separate appeal that is pending before this Court. *Osborne v. Nags Head*, COA 13-1123.

Subsequently, the Osbornes sought a cross-easement from the owners of Lot 29 to proceed with construction of the shared driveway, pursuant to the 1997 variance. The owners of Lot 29 refused to grant the necessary cross-easement, and provided an affidavit documenting their refusal.

On 11 June 2012, the Osbornes filed a motion to reconsider before BOA, citing a change in circumstances and new evidence. On 12 July 2012, BOA held a meeting regarding the Osbornes' motion to reconsider. A motion was made to deny the motion, based upon a failure to show a substantial change in circumstances. The members of BOA voted 3-2 in favor of denying the motion to reconsider. However, BOA then determined that a 4/5 supermajority vote was required, and therefore the motion to deny reconsideration failed.

BOA then conducted a hearing upon the motion to reconsider. After hearing arguments, BOA determined that the Osbornes still had a reasonable use for the property, and in an order dated 13 September 2012, denied the Osbornes' request for a variance. The Osbornes appealed to the Superior Court of Dare County, which, on 16 April 2013, affirmed BOA's decision to deny the Osbornes' request.

The Osbornes appeal.

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II. Standard of Review

The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal. When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test. However, [i]f a petitioner contends the [b]oard's decision was based on an error of law, *de novo* review is proper. Moreover, [t]he trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citations and quotation marks omitted).

"Under a *de novo* review, the superior court consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment." *Id.* (citations and quotation marks omitted).

III. Denial of the Variance

On appeal, the Osbornes contend that BOA erred in denying their variance request on 13 September 2012, and that the trial court erred in affirming BOA's decision. We disagree.

When BOA considered the Osbornes' motion to reconsider, its members "voted three in favor of denying the Motion to Reconsider and two against denying it." The Chair then "announced that the Motion to Reconsider failed as it did not pass by the needed 4/5 vote."

The Chair misconstrued the applicable law. The General Statutes provide that "[t]he concurring vote of four-fifths of the board shall be necessary to *grant a variance*. A majority of the members shall be required to decide any other *quasi-judicial* matter or to determine an appeal made in the nature of certiorari." N.C. Gen. Stat. § 160A-388(e) (1) (2013) (emphasis added); *see also* Nags Head Town Code § 48-595 (2013). The language of the statute is quite clear; a four-fifths majority is required to grant a variance, but an ordinary majority is sufficient to conduct other business. In the instant case, three fifths of BOA voted to deny the motion to reconsider. Under both the North Carolina General Statutes and the Nags Head Town Code, this was a sufficient vote to deny the motion to reconsider.

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The failure to deny a negative proposition is not the same as adopting a positive proposition. BOA was not voting on a motion to grant a variance, but rather on a motion to deny a motion to reconsider.

Because the chair of BOA mistakenly ruled that the motion to reconsider had passed, BOA was without authority to consider the merits of the motion. Boards of Adjustments, and other local government boards, perform vital services within our governmental structure. It is as important that they follow proper procedures as it is for city councils and boards of county commissioners. Procedures for the operation of such boards are in place to ensure fair treatment for all persons who come before them for rulings. We cannot ignore the violation, in the instant case, of procedures set forth in N.C. Gen. Stat. § 160A-388(e) and the Town Code of Nags Head.

BOA's order dated 12 July 2012 as to the merits of the Osbornes' application for a variance is vacated. The order of the trial court dated 16 April 2013 is also vacated. This matter is remanded to the Superior Court of Dare County for further remand to the Board of Adjustment of the Town of Nags Head. BOA is directed to enter an order denying the Osbornes' motion to reconsider, dated 11 June 2012.

VACATED AND REMANDED.

Judges HUNTER, Robert C., and BRYANT concur.

NORLINDA PHILBECK, EMPLOYEE, PLAINTIFF

v.

UNIVERSITY OF MICHIGAN, EMPLOYER, AND STAR INSURANCE COMPANY,
CARRIER, DEFENDANTS

No. COA13-911

Filed 15 July 2014

1. Workers' Compensation—compensable injury—unexplained fall

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's accident was due to an unexplained fall and was, therefore, compensable. The Commission's findings that plaintiff did not know why she fell and that the medical theories explaining the various possible causes of her fall were

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speculative and unsupported by sufficient evidence were supported by the record and these finding supported its legal conclusion that plaintiff's fall was unexplained.

2. Workers' Compensation—temporary total disability benefits—inability to earn pre-injury wage—caused by injury

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff temporary total disability benefits beyond the date plaintiff was released to return to work without any permanent restrictions. The Commission's findings were supported by competent evidence, and these findings supported its conclusion that plaintiff was unable to earn her pre-injury wage in the same or any other employment under the second prong of *Russell* and that plaintiff's inability to earn her pre-injury wage was caused by her injury.

Appeal by defendants from opinion and award entered 25 April 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 January 2014.

Bobby L. Bollinger, Jr. for plaintiff-appellee.

Rudisill White & Kaplan, P.L.L.C., by John R. Blythe, for defendants-appellants.

DAVIS, Judge.

University of Michigan and Star Insurance Company (collectively "Defendants") appeal from the Opinion and Award of the North Carolina Industrial Commission ("the Commission") awarding Norlinda Philbeck ("Plaintiff") workers' compensation benefits. The primary issue before us is whether the Commission erred in concluding that Plaintiff's accident was due to an unexplained fall and, therefore, compensable. After careful review, we affirm the Commission's Opinion and Award.

Factual Background

Plaintiff is a 67-year-old woman who was employed at the time of her injury by the University of Michigan as a field interviewer in social sciences research. Plaintiff's job duties required her to travel from her home in North Carolina to various locations on the East Coast to interview potential participants for a research study. Plaintiff would travel to an assigned location and interview randomly selected individuals.

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On 8 August 2011, Plaintiff was in Columbia, Maryland conducting interviews for the study. Plaintiff visited a small apartment complex and attempted to interview one of the residents. When she discovered that the resident was not eligible to participate in the study, Plaintiff began walking back to her vehicle. On the way to her vehicle, Plaintiff fell and fractured her left arm near her wrist. At the hearing before the deputy commissioner, Plaintiff testified: “I don’t know why I fell. . . . I might have stumbled. I don’t know what happened. . . . Seconds after I hit the ground I think that I – I was kind of dazed. I think I might have been on the ground a few seconds and then I looked at my arm and I could see that it was knocked out of place. It was deformed.”

Plaintiff was transported to Laurel Regional Hospital for treatment, and medical personnel administered various tests in an effort to determine why she had fallen. Plaintiff testified that the emergency room staff “didn’t know why [she] fell” and “said there was no medical reason.” Medical records from the emergency room indicated that Plaintiff had suffered a fall, was unable to explain what caused her to fall, and had experienced a loss of consciousness. Dr. Michael E. Carlos, one of her treating physicians at Laurel Regional Hospital, noted that “vasovagal mechanism” was the “most likely reason for the syncope [loss of consciousness]” and that the injury to Plaintiff’s arm was a “left radioulnar fracture.”

Dr. Neveen Habashi (“Dr. Habashi”), Plaintiff’s primary care physician since 2006, reviewed Plaintiff’s medical records from Laurel Regional Hospital and opined that Plaintiff’s fall was caused by heat exhaustion. Dr. Habashi was not, however, able to state with a reasonable degree of medical certainty that heat exhaustion was the cause of Plaintiff’s fall. Instead, Dr. Habashi noted that since Plaintiff had “no underlying medical problems that would predispose her” to falling and passing out, Plaintiff’s fall was likely “environmentally related.” Dr. Habashi also acknowledged that at the time she concluded that Plaintiff’s fall was probably heat related, she was not aware of the note on Plaintiff’s intake records from the hospital stating that Plaintiff “was not overheating.”

When Plaintiff returned to North Carolina, she sought treatment for her left arm from Dr. Mark McGinnis (“Dr. McGinnis”), an orthopedic surgeon. Dr. McGinnis surgically repaired the fracture on 15 August 2011 using a dorsal plate and seven surgical screws. Plaintiff subsequently had numerous follow-up visits with Dr. McGinnis. Dr. McGinnis took Plaintiff out of work until 6 September 2011, at which time he released her to work with a one-pound lifting restriction for her left arm. On 18 October 2011, Dr. McGinnis placed Plaintiff on a left arm lifting restriction of no

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more than 20 pounds. On 12 December 2011, Dr. McGinnis concluded that Plaintiff had reached maximum medical improvement and released Plaintiff to work without restrictions.

Plaintiff filed a Form 18 seeking workers' compensation benefits in connection with her 8 August 2011 fall, and on 15 November 2011, Defendants denied Plaintiff's claim on the basis that the "alleged injuries were a result of [an] idiopathic condition." The matter was heard by Deputy Commissioner Phillip A. Holmes on 22 May 2012. Deputy Commissioner Holmes filed an opinion and award on 22 October 2012 concluding that Plaintiff's injury was "due to factors that were not job related" and denying her claim for workers' compensation benefits.

Plaintiff appealed, and the Full Commission heard the matter on 1 March 2013. In its Opinion and Award filed on 25 April 2013, the Commission, with one commissioner dissenting, reversed the deputy commissioner and awarded Plaintiff temporary total disability benefits. Defendants appealed to this Court.

Analysis**I. Compensability of Plaintiff's Injury**

[1] Our review of an opinion and award of the Industrial Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). When reviewing the Commission's findings of fact, this Court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding[s]." *Id.* (citation and quotation marks omitted).

The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 454 (2009). The Commission's conclusions of law, however, are reviewed *de novo*. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74, *disc. review denied*, ___ N.C. ___, 719 S.E.2d 26 (2011). Evidence supporting the plaintiff's claim is to be viewed in the light most favorable to the plaintiff, and the plaintiff is entitled to the benefit of any reasonable inferences that may be drawn from the evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

Under the Workers' Compensation Act, an injury is compensable if the claimant proves three elements: "(1) that the injury was caused by an

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accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment.” *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010) (citation and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 705 S.E.2d 746 (2011). Here, Defendants acknowledge that Plaintiff’s injury was (1) caused by an accident; and (2) sustained in the course of her employment. However, the Commission erred in awarding compensation, they argue, because the injury did not arise out of Plaintiff’s employment. Specifically, they contend that Plaintiff fell because she fainted and, as such, her injury could not be deemed compensable under the doctrine of “unexplained falls.”

In a workers’ compensation case, if the cause or origin of a fall is unknown or undisclosed by the evidence, “we apply case law unique to unexplained fall cases. When a fall is unexplained, and the Commission has made no finding that any force or condition independent of the employment caused the fall, then an inference arises that the fall arose out of the employment.” *Id.* at 736, 699 S.E.2d at 127. This inference is permitted because when the cause of the fall is unexplained such that “[t]here is no finding that any force or condition independent of the employment caused or contributed to the accident[,] . . . the only active force involved [is] the employee’s exertions in the performance of his duties.” *Id.* (citation omitted).

Unexplained falls, however, are differentiated in our case law from falls associated with an idiopathic condition of the employee. “An idiopathic condition is one arising spontaneously from the mental or physical condition of the particular employee.” *Hodges v. Equity Grp.*, 164 N.C. App. 339, 343, 596 S.E.2d 31, 35 (2004) (citation and quotation marks omitted). Unlike a fall with an unknown cause — where “an inference that the fall had its origin in the employment is permitted” — a fall connected to an idiopathic condition is not presumed to arise out of the employment. *Id.* at 344, 596 S.E.2d at 35 (citation and quotation marks omitted). Instead, the compensability of an injury caused by a fall associated with an idiopathic condition is determined as follows:

- (1) Where the injury is clearly attributable to an idiopathic condition of the employee, with no other factors intervening or operating to cause or contribute to the injury, no award should be made;
- (2) Where the injury is associated with any risk attributable to the employment, compensation should be allowed, even though the employee may have suffered from an idiopathic condition which precipitated or contributed to the injury.

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Hollar v. Montclair Furniture Co., 48 N.C. App. 489, 496, 269 S.E.2d 667, 672 (1980).

Defendants argue that Plaintiff's injury was not compensable because her fall (1) was a result of an idiopathic condition; and (2) was not associated with any risk attributable to her employment. In making this argument, Defendants rely primarily on *Hollar*. In *Hollar*, the plaintiff was working in an "extremely hot" and poorly ventilated work environment when she "suddenly, for an unexplained reason, felt as if she were passing out." *Id.* at 490, 269 S.E.2d at 669. The plaintiff fainted, fell to the floor, and struck her back. The Commission concluded that the plaintiff's injury was not compensable, and she appealed to this Court. *Id.* at 489, 269 S.E.2d at 668.

On appeal, we first noted that the plaintiff's fall "d[id] not come within the 'unexplained' category of falls" because "it [was] clear that [the] plaintiff fell because she fainted." *Id.* at 491, 269 S.E.2d at 669. Consequently, we determined that the compensability of the plaintiff's claim turned on why she fainted — specifically, "whether [her] fainting was caused in any part by the conditions or circumstances of her employment." *Id.* at 497, 269 S.E.2d at 672. Because the record was devoid of any medical evidence as to why the plaintiff fainted, we remanded the matter to the Commission so that it could determine if the plaintiff's fainting was caused solely by an idiopathic condition or if it was in some way associated with the conditions of her employment. *Id.*

Defendants contend that this Court's decision in *Hollar* is controlling in the present case. As such, they argue that the Commission erred in applying the law of unexplained falls to Plaintiff's claim. We disagree.

Here, in determining that Plaintiff's injury arose from her employment and was therefore compensable, the Commission made the following pertinent findings of fact:

4. The fall on August 8, 2011, occurred while Plaintiff was walking in a parking lot after the conclusion of an attempted interview at an apartment complex. Plaintiff had been out of her car for approximately 10 to 15 minutes when she fell. Plaintiff does not recall what, if anything, caused her to fall. She did not recall any broken pavement or objects that caused her fall.
5. Immediately after the fall, Plaintiff was taken by an ambulance and admitted to Laurel Regional Hospital, whereupon she informed her medical providers that "she

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was not overheated” prior to the fall. She was unable to tell the Emergency Room staff why she fell. The ambulance crew that transported Plaintiff interviewed an unnamed witness at the scene of the fall, who reported that she did not see any obvious reason to cause Plaintiff’s fall.

6. While admitted to Laurel Regional Hospital, Dr. Michael E. Carlos, treated Plaintiff and noted that “vasovagal mechanism” was the “most likely reason for the syncope” and that dehydration “predisposed her to vasovagal syncope.”

....

8. On August 19, 2011, Plaintiff treated with her primary care physician, Dr. Naveen Habashi. Dr. Habashi opined that Plaintiff fainted and fell due to exposure to environmental elements, such as overheating. Dr. Habashi also opined that the facts related to Plaintiff’s food and fluid intake prior to the fall were “consistent with a person potentially suffering from a dehydration condition,” and that dehydration contributed to Plaintiff’s fainting. However, Dr. Habashi was not able to testify to a reasonable degree of medical certainty that heat exhaustion, dehydration, or any other medical condition caused Plaintiff’s fall. The Full Commission finds Dr. Habashi’s testimony to be speculative with regard to the cause of Plaintiff’s fall and assigns little weight to the opinions of Dr. Habashi. Dr. Habashi testified that the diagnosis made by Dr. Carlos of “vasovagal mechanism” is a non-specific diagnosis and by itself, it does not explain why Plaintiff fell.

....

12. Plaintiff at various times has speculated that she may have fallen due to being overheated, dehydrated, or stressed, but Plaintiff consistently reported and testified that she actually does not know what caused her to fall. Based upon the preponderance of the credible evidence of record, the Full Commission finds that there is insufficient evidence that Plaintiff was overheated due to her work environment, and there is insufficient evidence that Plaintiff fainted and fell due to heat exhaustion.

13. Plaintiff recalled the sight of almost hitting the ground and seeing her deformed wrist immediately after the fall

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while lying on the ground. Plaintiff testified that she may have been dehydrated on August 8, 2011, because she did not eat or drink any fluids between breakfast at 8:00 a.m. and the fall which occurred at 2:30 p.m., but there is insufficient medical evidence to support a finding that she fell due to dehydration.

14. The Full Commission finds that Plaintiff's fall was due to factors that were not disclosed by the evidence, and that her fall was unexplained. There was no competent medical opinion evidence presented to establish a medical or idiopathic reason for her fall.

Based on these findings, the Commission concluded as a matter of law that "Plaintiff's unexplained fall on August 8, 2011, constitute[d] a compensable injury by accident."

Contrary to Defendants' contention, *Hollar* is distinguishable from the present case. In *Hollar*, the fact that it was the plaintiff's fainting episode that caused her to fall and sustain an injury was uncontroverted. *Hollar*, 48 N.C. App. at 491, 269 S.E.2d at 669. Here, conversely, the Commission found that the medical evidence did *not* sufficiently establish the cause of Plaintiff's fall. Furthermore, the Commission declined to make a finding that Plaintiff did, in fact, faint. We believe that based on the conflicting evidence in the record, the absence of such a finding was permissible.

Plaintiff stated on several occasions that she does not know why she fell. While at various times she speculated that she could have been overheated, dehydrated, or stressed at the time she fell, she provided no consistent explanation of the reason for her fall. The medical evidence suggests that Plaintiff suffered a loss of consciousness at some point but fails to provide clarity as to whether Plaintiff fell because she fainted. The Commission determined that the testimony offered by Dr. Habashi regarding the possible cause of Plaintiff's fall was speculative and assigned that testimony little weight. The Commission therefore concluded that there was insufficient credible evidence that Plaintiff fell due to heat exhaustion or dehydration.

It is well established that the Commission "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation and quotation marks omitted). As such, its determinations regarding the credibility of witnesses or the weight certain evidence

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is to be accorded are not reviewable on appeal. *See Seay v. Wal-Mart Stores, Inc.*, 180 N.C. App. 432, 434, 637 S.E.2d 299, 301 (2006) (“This Court may not weigh the evidence or make determinations regarding the credibility of the witnesses.”).

The Commission’s findings that Plaintiff “does not know what caused her to fall” and “recalled the sight of almost hitting the ground” are supported by competent record evidence. Furthermore, these findings were not challenged by Defendants on appeal and are thus binding on this Court. *See Allred v. Exceptional Landscapes, Inc.*, ___ N.C. App. ___, ___, 743 S.E.2d 48, 51 (2013) (“Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.”). The Commission’s findings as to the appropriate weight and consideration to be accorded to the medical evidence regarding the various theories of why Plaintiff might have fallen are within its discretion as the trier of fact, and this Court is “not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached.” *Hill v. Hanes Corp.*, 319 N.C. 167, 172, 353 S.E.2d 392, 395 (1987) (citation and quotation marks omitted).

Once the Commission determined that the evidence suggesting Plaintiff’s fall occurred because of heat exhaustion or dehydration was speculative and entitled to little to no weight, there was no remaining evidence regarding the cause or origin of her fall. Consequently, we cannot conclude that the Commission erred in its ultimate determination that Plaintiff’s fall was unexplained and “due to factors that were not disclosed by the evidence.” *See Sheenan v. Perry M. Alexander Constr. Co.*, 150 N.C. App. 506, 514, 563 S.E.2d 300, 305 (2002) (explaining that Commission is sole judge of weight and credibility of evidence and, as such, may accord less weight to testimony of medical expert if it determines that expert’s opinions are based on inaccurate account of circumstances surrounding injury).

Thus, the Commission’s findings that (1) Plaintiff does not know why she fell; and (2) the medical theories explaining the various possible causes of her fall were speculative and unsupported by sufficient evidence, support its legal conclusion that Plaintiff’s fall was unexplained. *See Slizewski v. Int’l Seafood, Inc.*, 46 N.C. App. 228, 232, 264 S.E.2d 810, 813 (1980) (holding that workers’ compensation claim was compensable where plaintiff could not recall why he fell and “[t]he evidence, or lack thereof, on the cause of the fall is sufficient to sustain the finding that the cause of the fall was unknown”). As such, we affirm the Commission’s determination that Plaintiff’s injury was compensable.

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II. Temporary Total Disability Benefits

[2] Defendants next assert that the Commission erred in awarding Plaintiff temporary total disability benefits beyond 12 December 2011, the date Plaintiff was released to return to work without any permanent restrictions. Defendants argue that as of that date she could no longer establish that her injury was affecting her ability to earn her pre-injury wage and that, for this reason, an award of temporary total disability benefits was improper. We disagree.

“The term ‘disability’ means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” N.C. Gen. Stat. § 97-2(9) (2013). Accordingly, to support a conclusion of disability, the Commission must find

(1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual’s incapacity to earn was caused by plaintiff’s injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A claimant may prove the first two elements of disability through several methods, including

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib’n, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted); see *Medlin v. Weaver Cooke Constr., LLC*, ___ N.C. ___, ___ S.E.2d ___, slip op. at 12-13 (No. 411A13) (filed Jun. 12, 2014) (explaining that plaintiff “may prove the first two elements through any of the four methods articulated in *Russell*, but these

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methods are neither statutory nor exhaustive”). “In addition, a claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury.” *Medlin*, ___ N.C. ___, ___ S.E.2d ___, slip op. at 13.

“The absence of medical proof of total disability . . . does not preclude a finding of disability under one of the other three *Russell* tests.” *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007) (citation, quotation marks, and brackets omitted) (concluding that plaintiff could still be disabled under second or third prong of *Russell* test despite being released to work without restrictions). Here, citing *Hilliard*, the Commission found Plaintiff had proved that — as a result of her injury and despite a reasonable effort on her part — she was unable to obtain suitable employment within her restrictions. Specifically, the Commission found that once Plaintiff was released to return to work, the University of Michigan did not have a job available for her and that Plaintiff “engaged in an unsuccessful, reasonable job search after being released to work with restrictions, but received no job offers.” The Commission further found that Plaintiff’s reasonable job search continued until 2 February 2012, when she refused suitable employment offered to her by the University of Michigan. As such, the Commission concluded that Plaintiff “suffered a loss in wage earning capacity as a result of her compensable injury . . . through February 2, 2012” but “has failed to prove any loss of wage earning capacity as a result of her compensable August 8, 2011 injury after February 2, 2012.”

These findings are supported by Plaintiff’s testimony regarding both her job search and her ongoing experience with pain and range-of-motion limitations after being released to work. *See Davis v. Hospice & Palliative Care of Winston-Salem*, 202 N.C. App. 660, 670, 692 S.E.2d 631, 638 (2010) (“In addition to medical testimony, an employee’s own testimony that he is in pain may be evidence of disability.” (citation and quotation marks omitted)). Nor do Defendants specifically challenge these findings. As such, they are binding on appeal. *See Strezinski v. City of Greensboro*, 187 N.C. App. 703, 706, 654 S.E.2d 263, 265 (2007) (“Findings of fact that are not challenged on appeal are binding on this Court.”), *disc. review denied*, 362 N.C. 513, 668 S.E.2d 783 (2008). Because the Commission’s findings of fact support its conclusion that Plaintiff established that she was unable to earn her pre-injury wage in the same or any other employment from 12 December 2011 to 2 February 2012 under the second prong of *Russell* and that Plaintiff’s inability to earn her pre-injury wage was caused by her injury, we overrule Defendants’ argument

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and affirm the Commission's award of temporary total disability benefits to Plaintiff.

Conclusion

For the reasons stated above, we affirm the Commission's Opinion and Award.

AFFIRMED.

Judges STEELMAN and STEPHENS concur.

CARL H. POOLE, PLAINTIFF

v.

UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, DEFENDANT

No. COA13-1345

Filed 15 July 2014

1. Workers' Compensation—legal standard—willingness to resume vocational rehabilitation

The Industrial Commission did not err in a workers' compensation case by allegedly applying an incorrect standard. Where plaintiff's declaration of willingness to resume vocational rehabilitation and evidence in support thereof was deemed credible by the Commission, such a finding properly supported the correct legal standard.

2. Workers' Compensation—authorized treating physician—acceptance of change in medical providers

The Industrial Commission did not err in a workers' compensation case by finding that one of plaintiff's doctors was an authorized treating physician. Although plaintiff continued medical treatment with a doctor not authorized to accept workers' compensation patients, defendant UNC had acknowledged and already accepted plaintiff's change in medical providers.

Judge HUNTER, Robert C., concurring in part and dissenting in part.

Appeal by defendant from opinion and award entered 27 August 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 April 2014.

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Attorney General Roy Cooper, by Assistant Attorney General Karissa J. Davan, for defendant-appellant.

The Law Offices of Martin J. Horn, PLLC, by Martin J. Horn, for plaintiff-appellee.

BRYANT, Judge.

Where plaintiff's declaration of willingness to resume vocational rehabilitation and evidence in support thereof is deemed credible by the Industrial Commission, such a finding properly supports the correct legal standard and will not be disturbed on appeal. The Industrial Commission did not err in awarding plaintiff continued medical treatment with a doctor not authorized to accept workers' compensation patients where UNC had acknowledged and already accepted plaintiff's change in medical providers.

On 23 April 1992, plaintiff Carl H. Poole suffered a compensable injury to his lower back while moving tables for his employer, the University of North Carolina at Chapel Hill ("UNC"). On 9 May 1992, UNC filed a Form 19, "Report of Employee's Injury or Occupational Disease," and on 5 June a Form 21, "Agreement for Compensation for Disability," regarding plaintiff's injury. Under the North Carolina Workers' Compensation Act, UNC was to provide plaintiff with temporary total disability payments, medical care, and other benefits such as vocational rehabilitation relating to plaintiff's lower back injury.

On 28 April 1998, UNC filed a Form 24, "Application to Terminate or Suspend Payment of Compensation," alleging that plaintiff had failed to cooperate with vocational rehabilitation services. UNC's Form 24 was granted by order on 10 July 1998, suspending plaintiff's temporary disability compensation payments "until plaintiff makes a proper showing that he is willing to comply with reasonable rehabilitation efforts."

On 15 July 2005, plaintiff filed a Form 18 seeking pain management treatment which UNC accepted. On 25 May 2007, plaintiff filed a Form 33, "Request for Hearing," alleging that he had an ongoing disability and change in his condition. A Deputy Commissioner dismissed plaintiff's claim with prejudice on 17 November 2010, concluding that plaintiff's failure to bring his claim within a reasonable period of time had prejudiced UNC as a result.

On 18 January 2012, the Full Commission ("the Commission") reopened plaintiff's case and remanded it for a new evidentiary hearing

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before a Deputy Commissioner, which was held on 30 April 2012. In its award and order filed 27 August 2013, the Full Commission reversed the ruling of the Deputy Commissioner and ordered UNC to reinstate plaintiff's temporary disability compensation payments. UNC appeals.

UNC raises two issues on appeal: whether the Commission (I) applied an incorrect legal standard; and (II) erred in finding that one of plaintiff's doctors was an authorized treating physician.

I.

[1] UNC contends the Commission applied an incorrect legal standard in determining that plaintiff was entitled to temporary total disability after 8 May 2008. We disagree.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Starr v. Gaston Cnty. Bd. of Educ.*, 191 N.C. App. 301, 304, 663 S.E.2d 322, 325 (2008) (citations omitted). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Id.* at 304-05, 663 S.E.2d at 325 (citation omitted). "The Commission's conclusions of law are reviewed *de novo*." *Id.* at 305, 663 S.E.2d at 325.

UNC argues that the Commission applied an incorrect legal standard "by allowing [p]laintiff to merely assert a present willingness to comply with vocational rehabilitation." North Carolina General Statutes, section 97-25, holds that "[t]he refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases" N.C. Gen. Stat. § 97-25 (1992).¹ "G.S. 97-25 is clear in its mandate that a claimant who refuses to cooperate with a rehabilitative procedure is only barred from receiving further compensation "until such refusal ceases" *Sanhuesa v. Liberty Steel Erectors*, 122 N.C. App. 603, 608, 471 S.E.2d 92, 95 (1991) (holding that where the plaintiff's weekly compensation benefits were suspended pursuant to N.C.G.S. § 97-25, the fact remained "that plaintiff may again be entitled to weekly compensation benefits upon a proper

1. As plaintiff's claim arose in 1992, plaintiff's claim for continuing medical compensation must be considered under N.C.G.S. § 97-25 (1992).

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showing by plaintiff that he is willing to cooperate with defendants' rehabilitative efforts").

The Commission found as fact that plaintiff's compensation payments were suspended, effective 18 March 1998, "until plaintiff makes a proper showing that he is willing to comply with reasonable rehabilitation efforts." The Commission also found that although plaintiff's doctors felt plaintiff would never be able to return to work due to his injuries, plaintiff's management of his pain and depression had improved, and vocational rehabilitation would have "proactive benefits" for him. The Commission then found that:

[b]ased upon a preponderance of the evidence, Plaintiff's testimony at the hearing before Deputy Commissioner Ledford on May 8, 2008 that if there was employment available within his restrictions and physical limitations, he would be willing to cooperate with pursuing employment at that time, including attending job fairs and vocational rehabilitation is found to be credible and constituted a proper showing that he is willing to comply with reasonable rehabilitation efforts.

Finally, the Commission found as fact that:

[b]ased upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's suspension of compensation for failure to cooperate with "reasonable rehabilitation efforts" ended as of May 8, 2008 and compensation should have been reinstated as of May 8, 2008 as [UNC] had notice he was willing to cooperate and [UNC] has not proven that he was no longer disabled on as of May 8, 2008.

UNC contends the Commission applied an incorrect legal standard, stating that allowing a plaintiff to assert a present willingness to comply with vocational rehabilitation was rejected in *Powe v. Centerpoint Human Servs.* (*Powe I*), 215 N.C. App. 395, 715 S.E.2d 296 (2011), and that a test of constructive refusal of suitable employment must be applied. *Id.* at 405-06, 715 S.E.2d at 303-04.

In *Powe*, both the plaintiff and the defendant appealed an order of the Industrial Commission which found that the plaintiff failed to "fully comply" with the defendant's vocational rehabilitation services. This Court found that the legal standard applied by the Commission was incorrect, as the Commission needed to determine the extent to which

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the plaintiff, who was participating in some but not all vocational rehabilitation services, failed to “fully comply.” *Id.* at 406, 715 S.E.2d at 304. Noting that “declarations of a willingness to comply are not necessarily sufficient if deemed not credible by the Commission[,]” this Court remanded for the Commission to make further findings of fact as to the plaintiff’s compliance. *Id.* at 402, 715 S.E.2d at 301.

Powe is not applicable to the instant case. Here, plaintiff’s compensation was suspended beginning 18 March 1998 for failure “to cooperate with vocational rehabilitation services,” with suspension to continue “until plaintiff makes a proper showing that he is willing to comply with reasonable rehabilitation efforts.” The Commission found that plaintiff resumed his willingness to cooperate with vocational rehabilitation services on 8 May 2008 but that UNC made no attempt to provide plaintiff with any vocational services after 24 March 1998. UNC argues that plaintiff has not met his burden of demonstrating he is truly willing to undertake vocational services. Although “declarations of a willingness to comply are not necessarily sufficient if deemed not credible by the Commission[,]” here the Commission clearly noted in its findings of fact that it reviewed the entire record before it and found plaintiff’s testimony that he wished to begin vocational rehabilitation again to be credible.

UNC further contends the Commission applied an incorrect legal standard because UNC was prejudiced by plaintiff’s delay in seeking the resumption of his benefits. UNC cites *Daugherty v. Cherry Hosp.*, 195 N.C. App. 97, 670 S.E.2d 915 (2009), in support of its contention.

In *Daugherty*, the plaintiff was injured in 1992 while working as a nurse for the defendant. *Id.* at 98, 670 S.E.2d at 917. In 1993, the Commission granted plaintiff’s claim for physical injury, but denied her claim for psychological injury. *Id.* at 99-100, 670 S.E.2d at 917-18. The plaintiff resigned from her job with the defendant in 1994. *Id.* at 100, 670 S.E.2d at 918. In 2006, the plaintiff filed a Form 33, requesting a hearing as to her denied claim for psychological injury and seeking retroactive benefits and compensation. *Id.* The Commission denied the plaintiff’s claim, holding that it was now barred by laches. *Id.* at 101, 670 S.E.2d at 918. On appeal, this Court reversed and remanded, finding that the doctrine of laches was not applicable. Instead, the Commission needed to make findings as to whether the plaintiff’s claim should be dismissed, pursuant to Rule 613, for failure to timely prosecute. *Id.* at 103-04, 670 S.E.2d at 919-20.

Daugherty is not applicable to the instant case. Here, pursuant to N.C. Gen. Stat. § 97-25, plaintiff’s claim for temporary disability

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compensation was suspended pending plaintiff's willingness to resume cooperating with UNC's vocational rehabilitation services. Unlike the plaintiff in *Daugherty* whose claim was denied thirteen years prior to her seeking a hearing, here plaintiff's claim was only suspended, pending a finding by the Commission that plaintiff met the requirements needed to lift the suspension.

We are mindful of the length of time about which UNC complains. However, we note that plaintiff's temporary disability compensation was only suspended, not terminated, for refusal to cooperate with vocational rehabilitation. As such, the Commission could order, at any time, the reinstatement of plaintiff's compensation upon a determination that plaintiff's willingness to cooperate was supported by credible evidence. See *Powe v. Centerpoint Human Servs. (Powe II)*, ___ N.C. App. ___, ___, 742 S.E.2d 218, 926 (affirming the decision of the Commission to reinstate the plaintiff's temporary disability benefits, despite evidence that the plaintiff was extremely uncooperative with vocational rehabilitation efforts, for "even though there may be evidence from which a fact finder could determine plaintiff has failed to cooperate with vocational rehabilitation efforts, [this Court] must uphold the finding [of the Commission]." (citation omitted)); *Bowen v. ABF Freight Sys., Inc.*, 179 N.C. App. 323, 331, 633 S.E.2d 854, 859-60 (2006) ("Where any competent evidence exists to support a finding of the Commission, that finding is binding upon this Court. Thus, even though there may be evidence from which a fact finder could determine [the] plaintiff has failed to cooperate with vocational rehabilitation efforts, we must uphold the finding." (citation omitted)). Accordingly, as the Commission's opinion and award contained findings of fact, supported by competent evidence, which in turn supported its legal conclusions, those findings are conclusive on appeal. UNC's argument is overruled.

II.

[2] UNC next argues that the Commission erred in finding that one of plaintiff's doctors was an authorized treating physician. Specifically, UNC contends the Commission erred in awarding plaintiff continued treatment with a doctor and at a facility that does not accept workers' compensation patients. We disagree.

UNC argues that the Commission erred in finding that Dr. Clarke, one of plaintiff's doctors, was an authorized treating physician. In its findings of fact, the Commission noted that after plaintiff's compensation payments were suspended on 18 March 1998, plaintiff sought treatment from Dr. Clarke for his lower back injury beginning 22 September 1998.

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The Commission then found as fact that “[b]ased upon [UNC]’s Claim Activity Notes, [UNC] authorized Plaintiff to receive treatment from Dr. Clarke for ‘facets of his workers’ compensation claim.’” Additionally, the Commission made findings of fact that plaintiff continued to seek treatment from Dr. Clarke for lower back pain, as well as heart disease, sleep apnea, incontinence, depression, diabetes, and renal disease, through 4 August 2011, when Dr. Tobin took over plaintiff’s care from Dr. Clarke. These findings of fact are supported by competent evidence in the record. Further, plaintiff filed a Form 18 seeking pain management treatment with UNC on 15 July 2005, which UNC accepted on 31 August and approved on 6 September. As such, the Commission’s findings that UNC acknowledged and accepted plaintiff’s change in medical providers to Dr. Clarke, even though Dr. Clarke was not an authorized medical provider, are properly supported by competent evidence. *See* N.C.G.S. § 97-25(d) (2013) (“The refusal of the employee to accept any medical compensation when ordered by the Industrial Commission shall bar the employee from further compensation until such refusal ceases[.]”).

UNC further argues that the Commission erred because Dr. Tobin, plaintiff’s current treating physician, is not authorized to accept workers’ compensation patients and, thus, such a finding by the Commission violates N.C.G.S. § 97-25. The Commission made findings of fact, based on the evidence, that UNC continued to provide plaintiff with medical treatment even though plaintiff switched to a non-authorized doctor, Dr. Clarke, on 22 September 1998, after plaintiff’s authorized medical providers discontinued his treatment on 15 June 1998. Therefore, UNC accepted plaintiff’s claims for compensation for medical treatment through Dr. Clarke, even though Dr. Clarke was not authorized to accept workers’ compensation patients. The Commission also found, and the record supports, that Dr. Tobin succeeded Dr. Clarke as plaintiff’s primary physician. Accordingly, UNC’s argument is overruled.

Affirmed.

Judge STEELMAN concurs.

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

I concur with the majority’s well-reasoned conclusions as to the legal standard used by the Full Commission and the finding that one of plaintiff’s doctors was an authorized treating physician. However, because I

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believe the Full Commission was required to address defendant's motion to dismiss and the Deputy Commissioner's dismissal of plaintiff's claim pursuant to Workers' Compensation Rule 613 in its opinion and award, I respectfully dissent and conclude that this matter should be remanded for further proceedings.

Background

Carl H. Poole ("plaintiff") suffered a compensable work-related injury on 23 April 1992. His employer, the University of North Carolina at Chapel Hill ("UNC"), filed a Form 21, "Agreement for Compensation for Disability," and provided plaintiff with medical care and vocational rehabilitative services. Plaintiff's benefits were suspended on 10 July 1998 for failure to cooperate with the vocational rehabilitation services that defendant provided. Compensation was to be suspended "until plaintiff makes a proper showing that he is willing to comply with reasonable rehabilitation efforts."

On 15 May 2007, plaintiff filed a Form 33, "Request for Hearing," in which he requested compensation be reinstated and alleged a "change in condition." On 7 May 2007, defendant filed a motion to dismiss, alleging that plaintiff's claim was barred by laches and the statute of limitations. The parties were heard on defendant's motion to dismiss by Deputy Commissioner Kim Ledford ("Deputy Commissioner Ledford") on 8 May 2008. In Deputy Commissioner Ledford's opinion and award, the issues for determination were stated as follows:

1. Whether Plaintiff's claim is barred by the Statute of Limitations, either pursuant to N.C. Gen. Stat. § 97-47 or other statute?
2. Whether Plaintiff's claim otherwise should be dismissed due to his failure to prosecute this claim in a timely manner per the Rules of the Industrial Commission?
3. Whether Plaintiff's claim for additional medical treatment is otherwise barred?

After hearing testimony from the parties and receiving evidence, Deputy Commissioner Ledford entered the following relevant findings of fact in her opinion and award:

20. Following the suspension of benefits and the last payment of indemnity compensation in July 1998, Plaintiff did not seek reinstatement of indemnity compensation until the filing of his Form 33 in May 2007, almost nine

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years after the entry of the Order of Special Deputy Commissioner Gillen.

21. Plaintiff has shown no reason for his failure to appeal in a timely manner the Order of Special Deputy Commissioner Gillen, which suspended Plaintiff's ongoing total disability benefits. Plaintiff has otherwise shown no reason for his failure to seek reinstatement of indemnity compensation for almost nine years, an unreasonable delay. Due to this unreasonable delay, Plaintiff has essentially abandoned and failed to prosecute his claim.

22. This unreasonable delay has hindered the Defendant's ability to investigate the matter. The delay has prevented Defendant from providing services otherwise intended to lessen Plaintiff's period of disability.

23. During the passage of the nine years since the suspension of his benefits, Plaintiff's physical condition has changed due primarily to health issues unrelated to his compensable injury, including his heart disease and kidney disease, which are now his primary limiting health conditions.

24. The Defendant has been prejudiced by Plaintiff's failure to pursue this matter in a timely manner. Based upon Plaintiff's unreasonable delay, and the resulting prejudice to Defendant, sanctions short of dismissal of the claim will not suffice.

Pursuant to these findings, Deputy Commissioner Ledford entered the following conclusions of law:

8. Pursuant to Rule 613 of the North Carolina Industrial Commission Workers' Compensation Rules, "Upon proper notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion or by motion of any party for failure to prosecute or to comply with these Rules or any Order of the Commission." Prior to dismissing a claim pursuant to this Rule, the Commission must find: (1) that Plaintiff acted in a manner which deliberately or unreasonably delayed the matter, (2) that Defendant was prejudiced by the Plaintiff's delay or failure to prosecute, and (3) that sanctions short of dismissal would not suffice.

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Lee v. Roses Stores, Inc., 162 N.C. App. 129, 131, 590 S.E.2d 404, 406 (2004).

9. In this case, Plaintiff has been given proper notice and opportunity to be heard on the issue of dismissal of his case. The greater weight of credible evidence shows that Plaintiff failed to prosecute his claim within a reasonable period of time. Where Plaintiff waited nine years to pursue his claim for additional benefits, Defendant has been prejudiced, and nothing short of dismissal would be fair and just.

Thus, Deputy Commissioner Ledford dismissed plaintiff's claim with prejudice on 17 November 2010. Plaintiff appealed this ruling to the Full Commission.

By order of the Full Commission on 18 January 2012, the case was reopened and remanded for a new evidentiary hearing. The Full Commission found "old" files related to the case in the Industrial Commission file room, including "correspondence from the parties, Industrial Commission Orders, various forms filed by the parties, form agreements, [and] medical records submitted primarily as attachments to various motions dating from 1992 to 2007." Because Deputy Commissioner Ledford did not have access to these files when she entered her opinion and award, the Full Commission remanded the matter for a new Deputy Commissioner to gather this evidence, order a transcript of the proceedings, and forward the transcript and evidence to the Full Commission for review and a determination.

Deputy Commissioner James C. Gillen ("Deputy Commissioner Gillen") presided over the new evidentiary hearing. On 13 February 2013, he entered an order transferring the requested materials to the Full Commission but did not issue an opinion and award on the substance of the parties' claims. After receiving the evidence and transcript from Deputy Commissioner Gillen, the Full Commission entered its opinion and award on 27 August 2013, from which defendant appeals. In its opinion and award, the Full Commission stated that it "reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Ledford and Deputy Commissioner Gillen and the briefs, supplemental briefs and arguments of the parties before the Full Commission." However, the Full Commission's opinion and award contained no findings of fact or conclusions of law relating to the substance of Deputy Commissioner Ledford's dismissal of plaintiff's claim pursuant to Rule 613, the almost nine-year delay in the proceedings, or

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the potential prejudice to defendant that may have resulted from the delay. Rather, the Full Commission examined the new evidence introduced before the Deputy Commissioner and concluded that plaintiff had carried his burden of demonstrating his willingness to cooperate with vocational rehabilitation. Thus, it ordered that plaintiff was entitled to temporary total disability benefits beginning 8 May 2008 and continuing until further order of the Commission. Defendant timely appealed from the Full Commission's opinion and award.

Discussion

On appeal, defendant argues that the Full Commission erred by failing to dismiss plaintiff's claim pursuant to Rule 613. Because the Full Commission failed to address this contention in its opinion and award, I believe that the matter should be remanded for entry of findings of fact and conclusions of law on this issue.

The Industrial Commission has exclusive original jurisdiction over workers' compensation proceedings. *Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 604, 70 S.E.2d 706, 708 (1952). It is required to hear the evidence and file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue[.]" N.C. Gen. Stat. § 97-84 (2013). "The reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). The Commission's findings of fact are conclusive on appeal when supported by competent evidence even though evidence exists that would support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

"[W]hen the transcript and record before the full Commission is insufficient to resolve all the issues, the full Commission must conduct its own hearing or remand the matter for further hearing." *Crump v. Independence Nissan*, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993) (quotation marks omitted). However, "[a]lthough the decision to take additional evidence is one within its sound discretion, *the full Commission has the duty and responsibility to decide all matters in controversy between the parties[.]*" *Id.* (emphasis added); see also *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 501, 616 S.E.2d 356, 360 (2005) ("It is well established that the full Commission has the duty and responsibility to decide all matters in controversy between the parties, and, if necessary, the full Commission must resolve

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matters in controversy even if those matters were not addressed by the deputy commissioner.” (citation and internal quotation marks omitted)).

Here, after hearing the parties on defendant’s motion to dismiss, Deputy Commissioner Ledford dismissed plaintiff’s claim with prejudice pursuant to Workers’ Compensation Rule 613, which provides that “[u]pon proper notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion *or by motion of any party* for failure to prosecute or to comply with these Rules or any Order of the Commission.” 4 N.C.A.C. 10A.0613(a)(3) (2013) (emphasis added). This Court has ruled that the Commission must make the following relevant findings before dismissing a case pursuant to Rule 613:

- (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant [caused by the plaintiff’s failure to prosecute]; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.

Lee v. Roses, 162 N.C. App. 129, 132-33, 590 S.E.2d 404, 407 (2004) (quoting *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001)).

Deputy Commissioner Ledford found as fact that: (1) “[p]laintiff has otherwise shown no reason for his failure to seek reinstatement of indemnity compensation for almost nine years, an unreasonable delay”; (2) “[t]his unreasonable delay has hindered the Defendant’s ability to investigate the matter[;] [t]he delay has prevented Defendant from providing services otherwise intended to lessen Plaintiff’s period of disability”; and (3) “[b]ased upon Plaintiff’s unreasonable delay, and the resulting prejudice to Defendant, sanctions short of dismissal of the claim will not suffice.” Thus, Deputy Commissioner Ledford entered all of the findings of fact required by the *Lee* Court before dismissing plaintiff’s claim with prejudice pursuant to Rule 613.

However, the Full Commission’s opinion and award is devoid of any factual findings or legal conclusions disposing of these arguments. Although the Full Commission stated that it “reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Ledford[,]” the Full Commission failed to address the basis of Deputy Commissioner Ledford’s ruling in her prior opinion and award—dismissal under Rule 613. The Full Commission also entered no findings or conclusions as to the delay in the proceedings, the potential prejudice to defendant that may have resulted from the delay, or the reasons for the delay—all of which were included in Deputy Commissioner

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Ledford's findings of fact in support of her ruling. As is made clear by the list of issues for determination in Deputy Commissioner Ledford's opinion and award, these contentions were raised by defendant in its motion to dismiss and were "in controversy" throughout these proceedings. *Payne*, 172 N.C. App. at 501, 616 S.E.2d at 360. Thus, because the Full Commission "has the duty and responsibility to decide all matters in controversy between the parties," *id.*, and because it failed to address the legal contentions that formed the basis of Deputy Commissioner Ledford's opinion and award, I would remand this matter back to the Full Commission for entry of appropriate findings and conclusions determining that issue.

Conclusion

Because the Full Commission failed to enter findings of fact or conclusions of law regarding defendant's motion to dismiss or Deputy Commissioner Ledford's previous dismissal of plaintiff's claim pursuant to Workers' Compensation Rule 613, I respectfully dissent from the majority's holding that the Full Commission's opinion and award adequately resolved all matters in controversy between the parties. Accordingly, I would remand this matter to the Full Commission.

JOHN C. PRELAZ AND DEBORAH A. PRELAZ, PLAINTIFFS

v.

TOWN OF CANTON, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT

No. COA14-225

Filed 15 July 2014

Deeds—declaration of title—rightful title holders—reversionary interest—directed verdict

The trial court erred by denying the Town's motion for a directed verdict at the close of plaintiffs' evidence and again at the close of all evidence in an action where plaintiffs sought a declaration of title recognizing them as the rightful title holders of certain real property and seeking recovery of rents. As a matter of law, the language relied upon by plaintiffs was precatory and could not trigger plaintiffs' reversionary interest in the Camp Hope property. The case was remanded to the trial court for entry of judgment in favor of defendant on directed verdict.

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Appeal by plaintiffs and cross-appeal by defendant from judgment entered 16 May 2013 by Judge W. David Lee in Haywood County Superior Court. Heard in the Court of Appeals 3 June 2014.

Roberts & Stevens, P.A., by Mark C. Kurdys and Ann-Patton Hornthal for plaintiffs-appellants.

McGuire Wood & Bisette, P.A., by Sabrina Presnell Rockoff, and Frank G. Queen and Burton C. Smith, Jr. for defendant cross-appellant and defendant-appellee.

ELMORE, Judge.

John C. Prelaz and Deborah A. Prelaz (“plaintiffs”) commenced this action against the Town of Canton (“the Town”) in Haywood County Superior Court. Plaintiffs prayed the trial court for a declaration of title recognizing them as the rightful title holders of certain real property and to enter an order for the recovery of rents. This real property consists of approximately 110 acres and is known as Camp Hope (“the Camp Hope property” or “the property.”). A trial began in the matter on 6 May 2013. At trial, plaintiffs argued that title to the property reverted to them when the Town violated an express condition of a governing deed. The Town argued that the language in the deed upon which plaintiffs relied was precatory. The trial court, finding that the language was not precatory, submitted to the jury the question of whether the Town violated an express condition by allowing a third party to operate a summer camp on the Camp Hope property primarily for the benefit of residents of areas and states other than Canton, Haywood, and adjoining counties. Unanimously ruling in the Town’s favor, the jury answered “no.” On 16 May 2013, the trial court entered an order declaring that the Town retained fee simple determinable title to the Camp Hope property. Plaintiffs now appeal, *inter alia*, the trial court’s denial of their (1) motion for a directed verdict, (2) motion for judgment notwithstanding the verdict, and (3) motion for a new trial. In its cross-appeal, the Town appeals the trial court’s denial of its motion for a directed verdict. After careful consideration, we conclude that the trial court erred when it denied the Town’s motion for a directed verdict. Accordingly, we reverse the trial court’s 16 May 2013 order and remand this matter to the trial court for entry of a judgment in favor of defendant on directed verdict.

I. Background

The relevant facts of this case are largely undisputed and are as follows: By deed dated 4 May 1992 (“the Deed”), Champion International

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Corporation (“Champion” or “grantor”), as party of the first part, conveyed title to the Camp Hope property to Donald W. Randolph, Carl M. Gillis, and R. Cecil Roberts, Trustees of the Robertson Memorial Young Men’s Christian Association (“YMCA”), as party of the second part, and to the Town, a municipal corporation, as party of the third part. The Deed is recorded in Book 426 at Page 771 in the Office of Register of Deeds in Haywood County.

Specifically, the Deed conveyed to the YMCA a fee simple determinable estate in the property so long as the property was used in accordance with certain enumerated express terms and conditions set forth in the Deed. The Deed conveyed to the Town a reversionary interest in the Camp Hope property which would, by operation of law and without re-entry or suit, cause title of the property to revert to the Town should the YMCA violate any of the express terms and conditions. Should the Town take title to the property, the Deed also required that the Town abide by certain enumerated express terms and conditions or risk forfeiting title. If the Town violated the express conditions contained in the Deed, Champion provided that title to the Camp Hope property would, by operation of law and without re-entry or suit, revert to Champion, or its successor corporation, as party of the first part. The YMCA subsequently forfeited its title to the Camp Hope property, and the Town took title to it on 25 July 1996. The Town has held title to the property as party in the third part since that time.

In March 2006, plaintiffs purchased a tract of land adjacent to the Camp Hope property. Soon thereafter, in April 2006, International Paper Company, successor by merger to Champion, assigned and conveyed its reversionary interest in the Camp Hope property to plaintiffs by assignment and Quitclaim Deed recorded in Book 667 at Page 179 in the Haywood County Register of Deeds. Plaintiffs have held a reversionary interest in the property as party in the first part since that time.

In April 2005, the Town negotiated a five-year lease agreement with Wellspring Adventure Camp, LLC (“Wellspring”) for the operation of a weight loss and fitness summer camp to be located on the Camp Hope property. Wellspring is a for-profit limited liability company that operates weight loss camps throughout the United States and Europe. On 11 April 2006, the Canton Board of Aldermen approved a two-year extension of the lease agreement. Pursuant to the lease terms, Wellspring has primary use and control of the property from 15 May through 15 September each year for the duration of the lease term. Wellspring is responsible for maintaining the property and paying a \$700.00 monthly rental fee to the Town. In addition, the lease requires that Wellspring not violate any of

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the enumerated conditions set forth in the Deed. Evidence at trial tended to show that Wellspring campers reside throughout the United States and may select the camp location of their choosing. Approximately 978 campers participated in the Wellspring summer camp at the Camp Hope property during the summers of 2005-2011. Of these, only 20 or so campers resided permanently in Haywood or adjoining counties.

A clause in the Deed provides: “the Town will not operate on the property a summer camp primarily for the benefit of residents of other areas and states.” Because so few campers resided permanently in the local community, plaintiffs filed suit against the Town based on an alleged violation of this clause, which plaintiffs argued was an express condition. At trial, the Town took the position that the clause was merely precatory. Alternatively, the Town argued that it did not violate this express condition (assuming it was one) because the operation of the Wellspring camp *did*, in fact, primarily benefit local residents, not residents from other areas and states. The Town presented the following evidence in support of its position: (1) the Town has received over \$450,000 in capital improvements to the Camp Hope property as a result of its lease with Wellspring; (2) the local economy has been boosted because Wellspring contracts with local exterminators, electricians, plumbers, and external vendors to maintain the grounds; (3) Wellspring operates family workshops that bring \$200,000 annually to local businesses; (4) Wellspring recommends Canton and Haywood County hotels and restaurants to the campers’ families; and (5) the Wellspring lease allows local residents to use the Camp Hope property from 15 September to 15 May each year.

To reflect the jury’s determination that the Town did not violate the condition requiring that it not allow a summer camp that primarily benefited residents from other areas and states to operate on the Camp Hope property, the trial court entered an order declaring that the Town retained fee simple determinable title to the property. Both parties now appeal.

II. Analysis

The Town raises one issue on cross-appeal—that the trial court erred in denying its motion for a directed verdict because the clause relied upon by plaintiffs in the Deed is precatory as a matter of law. We agree with the Town on this issue. Therefore, we need not address plaintiffs’ issues on appeal.

Initially we note that, although the jury ruled in favor of the Town, that favorable outcome does not prohibit the Town from raising this issue on appeal. *See Finkel v. Finkel*, 162 N.C. App. 344, 349, 590 S.E.2d

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472, 475 (2004) (holding that generally “the party who prevails at trial may appeal where the judgment is less favorable than that party thinks is just”). “The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury.” *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int’l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

The Deed specifically grants:

To the party of the third part a fee simple determinable estate in the lands hereinafter described (known as the Camp Hope property) which fee simple determinable estate shall automatically arise at such time as the parties of the second part, [the YMCA], shall violate any of the conditions imposed upon the parties of the second part as hereinafter enumerated. The fee simple determinable estate hereby granted to the party of the third part, once it has come into being, shall last so long as the said lands (and buildings that may be erected thereon) are used by the Town of Canton in accordance with the express conditions hereinafter **enumerated**, and no longer. [Emphasis added].

The Deed also describes the Town’s interest as follows:

Once its estate has arisen by operation of law . . . The Town of Canton, shall have and hold the above described land and premises [the Camp Hope property], together with all the privileges and appurtenances thereunto belonging, or in anywise thereunto appertaining, so long as the lands are used for the purposes hereinafter set out and in accordance with the conditions hereinafter set out and no longer, and **when the party of the third part ceases to use said property for said purposes or when the party of the third part shall violate any of the conditions placed upon the party of the third part; the title to said lands and premises shall, without re-entry or suit, automatically revert to the party of the first part**, Champion International Corporation, or its successor corporation. [Emphasis added].

The Town of Canton will hold title to the Camp Hope property hereinafter described and will use the same for the benefit of the same persons and groups of persons who have historically used the facilities of the YMCA in

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the Town of Canton and the Camp Hope property. This shall include citizens of the Town of Canton and citizens of Haywood County and adjoining counties but should not preclude the use of the property by persons from other areas, **but the Town will not operate on the property a summer camp primarily for the benefit of residents of other areas and states.** The Town will use its **best efforts** to see that the users of the facilities are those who have historically used the same. [Emphasis added].

As to the express conditions imposed on the YMCA, the Deed sets forth fourteen numbered paragraphs preceded by the sentence: "The conditions hereby placed upon the party of the second part . . . are as follows[.]" As to the conditions imposed on the Town, the Deed sets forth seventeen numbered paragraphs preceded by the sentence: "The conditions hereby placed upon the party of the third part, The Town of Canton, are as follows[.]" The express conditions placed on the Town include:

1. The property will be used for active recreational purposes.
2. The Town of Canton will keep the property free of trash and debris, clearing underbrush and will keep grassed areas mowed and in good condition.
3. The Town of Canton will maintain all structures existing at the time of this conveyance in good condition, ordinary wear and tear excepted. It will keep up the walls, roof, interior and exterior of the dining hall and all residence buildings and all water and sewer lines and septic facilities. If any structures must be removed because of age and ordinary wear and tear they will be cleared away and not allowed to remain in place.
4. The Town of Canton will use the property for active recreational purposes such as camping for scout troops, organized camping programs for other organizations, picnicking, social and political gatherings, games such as shuffleboard, baseball, softball, tennis, football, hiking, etc. but will not permit the land to be used solely in a passive manner such as reverting to its nature state with the sole recreational use being hiking.

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5. No general timbering operations will be allowed other than the cutting of diseased or dead timber and the ordinary thinning of new growth.
6. All camp fires will be carefully contained and built only in designated areas, such as on concrete pads or outdoor grills.
7. No firearms will be allowed within the area and no hunting or trapping of any kind will be allowed except the hunting or trapping of dangerous animals or snakes by proper governmental agencies.
8. The Town of Canton may build further recreational building, cabins, gyms, etc., but must maintain any such buildings so built.
9. The Town of Canton will permit no illegal activity to take place on the property.
10. The Town of Canton will permit no garbage or waste disposal on the property and will permit no hazardous substances to be brought on to the property or stored thereon.
11. The Town of Canton will carry liability insurance on the property in amounts it deems appropriate.
12. No permanent or semi-permanent hookups for mobile homes or recreational vehicles will be allowed on the property. Any such hookups in existence at the time that the Town of Canton's estate in the property arises will be removed from the property at the sole cost and expense of the Town of Canton. No mobile homes will be allowed on the property and recreational vehicles will be allowed only when such vehicles have their own source of power, water and sewer and then only for two weeks (or a lesser period). Recreational vehicles will be allowed on the property only in conjunction with other types of camping such as when a scout troop uses the area, the scout masters may bring a self-contained recreational vehicles on the property.
13. In the operation of the Camp Hope facilities by the Town of Canton, it may charges fees sufficient to enable the Town of Canton to recover the ordinary costs of the maintenance and operation of the Camp Hope facilities but will not charge fees in excess of those fees which

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would ordinarily recoup the expense of the maintenance and operating costs of the facilities. The Town of Canton will not operate Camp Hope as a profit making venture.

14. No building located on the property at such time as the Town of Canton's Estate may arise or no building erected thereafter will be occupied by any person or group of persons as a permanent residence except that one structure may be occupied by a caretaker of the property and his immediate family.

15. The Town of Canton will actively maintain the property at all times and will actively operate a program on the property (at least in warmer months) at all times.

16. Should The Town of Canton violate one or more of conditions number 1 through 14 and such violation is not remedied and continues for a period of 90 days after Champion International Corporation has given to the Town of Canton written notice of the violation, the continued violation of any one of conditions 1 through 14 for 90 days after such written notice will cause an automatic reverter of the title from Town of Canton to the party of the first part, Champion International Corporation.

17. Should the Town of Canton fail to actively maintain the property or actively operate a program on the property as such obligation is placed on the Town by condition number 15, and such failure to maintain or actively operate a program on the property shall continue for a period of one (1) year, the title to the property will also automatically revert from the Town of Canton to the party of the first part, Champion International Corporation.

On appeal, plaintiffs do not allege that the Town violated any of these seventeen conditions. Instead, it is plaintiffs' position that the clause in the Deed, "but the Town will not operate on the property a summer camp primarily for the benefit of residents of other areas and states[.]" constitutes an express condition, which, if violated, triggers plaintiffs' reversionary interest. Further, given that the Town (allegedly) violated this condition, plaintiffs contend that the trial court erred in denying their motion for a directed verdict and their motion for judgment notwithstanding the verdict. Alternatively, it is the Town's position that the clause is precatory and, therefore, merely advisory. Thus, any

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violation could not by operation of law trigger plaintiffs' reversionary interest. Again, we agree with the Town.

"In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument." N.C. Gen. Stat. § 39-1.1 (2013). "[T]he meaning of [a deed's] terms is a question of law, not of fact." *Elliott v. Cox*, 100 N.C. App. 536, 538, 397 S.E.2d 319, 320 (1990). Even "[a]mbiguous deeds traditionally have been construed by the courts according to rules of construction, rather than by having juries determine factual questions of intent." *Robinson v. King*, 68 N.C. App. 86, 89, 314 S.E.2d 768, 771 (1984). Therefore, the question of whether the language contained in a Deed is precatory is to be decided by the Courts as a matter of law.

"A grantor can impose conditions and can make the title conveyed dependent upon [a grantee's] performance. But if [the grantor] does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive." *Ange v. Ange*, 235 N.C. 506, 508, 71 S.E.2d 19, 20-21 (1952) (internal quotations and citations omitted). It is well established that "[t]he law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is *clearly manifested*." *Washington City Board of Education v. Edgerton*, 244 N.C. 576, 578, 94 S.E.2d 661, 664, (1956) (emphasis added). For a reversionary interest to be recognized, the deed must "contain express and unambiguous language of reversion or termination upon condition broken." *Station Associates, Inc. v. Dare Cnty.*, 350 N.C. 367, 370, 513 S.E.2d 789, 792 (1999). "[A] mere expression of the purpose for which the property is to be used without provision for forfeiture or re[-]entry is insufficient to create an estate on condition[.]" *Id.* at 373, 513 S.E.2d 793.

Applying this law to the Deed in the present case, we note that the document does, in fact, contain language of reversion or termination. However, the reversionary language is in reference to the seventeen enumerated conditions, not the clause on which plaintiffs rely. The Deed provides, should the Town cease "to use said property for said purposes" or "violate any of the conditions placed upon [the Town]," title to the property "shall, without re-entry or suit, automatically revert to . . . Champion . . . or its successor corporation." At the outset of the Deed, the grantor specified that both the YMCA and the Town could maintain

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title only if each used the property in accordance with the “express conditions hereinafter **enumerated** and no longer.” “Enumerate” means “to count off or designate one by one; to list.” BLACK’S LAW DICTIONARY 574 (8th ed. 1999). AS cited above, the Deed enumerates seventeen conditions placed upon the Town, none of which reference the clause at issue. Taken as a whole, it is apparent that the grantor intended to trigger reverter only if one of the enumerated conditions was broken. Further, condition #4 serves as a restraint on use, providing that the Town must use the property for recreational purposes. Arguably, if the grantor intended to further restrain the Town’s use of the property by prohibiting it from operating a summer camp that primarily benefited residents of other states, it would have done so in an enumerated paragraph.

However, the paragraph in which the clause is written is un-numbered and devoid of any express and unambiguous language of reversion upon condition broken. In fact, in their brief, plaintiffs do not direct us to any reversionary language in direct reference to this clause. Thus, nowhere in the paragraph or in the Deed itself is it “clearly manifested” that title to the property is to revert to Champion, or its successor, upon the Town’s violation of the clause. *See Edgerton, supra*. Moreover, the clause is followed by a sentence in which the grantor asks that the Town use its “best efforts” to ensure “that the users of the facilities are those who have historically used the same.” The inclusion of such subjective language in this paragraph is additional evidence that the grantor did not envision this paragraph or the clause therein to inflict a rigid restriction upon the title or to create a condition subsequent. Instead, we hold that this clause is precatory. Champion merely sought to express an intended purpose for which the property was (hopefully) not to be used. *See Ange*, 235 N.C. at 509, 71 S.E.2d at 21 (holding that a conveyance of land containing the clause “for church purposes only,” did not create a condition subsequent because, without reservation of power of termination or right of re-entry for condition broken, the clause merely expressed the motive and purpose which prompted the conveyance); *see also Nelson v. Bennett*, 204 N.C. App. 467, 472, 694 S.E.2d 771, 775 (2010) (concluding that the portion of a will providing that “[t]he house is not to be used for a business or Bed and Breakfast and is not to be leased out by [Ms.] Frejlach” was precatory because it was unaccompanied by express and unambiguous language of reversion or termination upon condition broken).

III. Conclusion

In sum, the trial court erred in denying the Town’s motion for a directed verdict at the close of plaintiffs’ evidence and again at the close

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of all evidence. As a matter of law, the language relied upon by plaintiffs is precatory and could not trigger plaintiffs' reversionary interest in the Camp Hope property. We remand this matter to the trial court for entry of a judgment in favor of defendant on directed verdict.

Reversed and remanded.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
STEPHEN ANTHONY GRANGER, DEFENDANT

No. COA13-1382

Filed 15 July 2014

1. Criminal Law—motion to suppress—minimum requirements

Defendant satisfied the minimum requirements for a motion to suppress driving while impaired blood test results and did not waive his right to argue a violation of his Fourth Amendment rights. Defendant's motion to dismiss on Fourth Amendment grounds may be treated as a motion to suppress even though it was not verified, because his motion to suppress based on a Sixth Amendment challenge was verified and contained substantially the same factual allegations.

2. Search and Seizure—warrantless blood draw—exigent circumstances—findings

In a driving while impaired prosecution, there was competent evidence in the record to support contested findings about a warrantless blood draw after an automobile accident. More specifically, the findings involved the length of the delay before the blood draw and the officer's concerns about defendant's pain medication.

3. Search and Seizure—warrantless blood draw—totality of circumstances—conclusion

The trial court's findings in a driving while impaired prosecution supported its conclusion that the totality of the circumstances showed that exigent circumstances justified a warrantless blood draw after a traffic accident.

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Appeal by Defendant from judgments entered 22 August 2013 by Judge William R. Pittman in New Hanover County Superior Court. Heard in the Court of Appeals on 24 April 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joseph L. Hyde, for the State.

Kerri L. Sigler, for Defendant-appellant.

DILLON, Judge.

Stephen Anthony Granger (“Defendant”) appeals from the judgment entered for driving while impaired following the denial of his motion to suppress. For the foregoing reasons, we affirm the trial court’s order denying Defendant’s motion to suppress.

I. Background

In the early morning hours of 1 May 2012, Defendant was involved in a motor vehicle accident in Wilmington where the vehicle he was operating rear-ended another vehicle. As a result of the accident, he was charged with driving while impaired (“DWI”) and failure to reduce speed.

On 25 June 2013, Defendant filed in the superior court¹ a motion to suppress the results from the test of his blood which was drawn shortly after the accident, arguing *inter alia* that his Sixth Amendment right to confront witnesses had been violated by the State’s failure to prove the chain of custody of his blood sample. On 22 July 2013, Defendant filed a motion to dismiss, arguing that his Fourth Amendment rights had been violated because the blood draw was performed without a warrant.

On 21 August 2013, Defendant’s motions were argued before the trial court. Evidence presented by the State tended to show the following: On 1 May 2012, Officer Eric Lippert with the Wilmington Police Department responded to a report of an accident occurring around 2:19 a.m. When he arrived at the scene, Officer Lippert observed Defendant sitting in the driver’s seat alone in his vehicle and Defendant’s vehicle had rear-ended a truck towing an enclosed trailer. Officer Lippert approached Defendant’s vehicle and noticed that Defendant was “in some level of pain, discomfort[,]” and had “a moderate odor of an alcoholic beverage coming from his person.” Defendant was subsequently transported to

1. This matter was originally brought in district court where Defendant was convicted of DWI. Defendant appealed that conviction to superior court.

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New Hanover Regional Medical Center by EMS, without Officer Lippert performing any sobriety checks on Defendant.

Officer Lippert also traveled to the hospital where he spoke with Defendant. During this encounter, Officer Lippert noticed that Defendant had “bloodshot and glassy eyes[,]” and Defendant kept interrupting him and telling him that “I’ve been drinking[.]” Defendant admitted to Officer Lippert that he had taken “three shots” between 10 p.m. and 11 p.m. and his last shot was 20 minutes before the accident or approximately 2 a.m. While Defendant was lying in his hospital bed, Officer Lippert gave Defendant two Alcosensor portable breath tests, one at 3:04 a.m. and the other at 3:09 a.m.; both tests were positive for alcohol. Because of Defendant’s condition, Officer Lippert was limited in the type of field sobriety tests he could perform. He administered the horizontal gaze nystagmus test, which Defendant did not pass. He also administered an alphabet test and a counting test, which Defendant passed.

Based on his investigation, Officer Lippert determined that he had sufficient probable cause to obtain a blood sample from Defendant. At 3:10 a.m., Officer Lippert read Defendant his implied consent rights and waited for a nurse to draw Defendant’s blood for analysis. At 3:50 a.m., a nurse became available, and Officer Lippert made a request to Defendant for a blood draw; however, Defendant refused to give his consent. Officer Lippert testified that he did not get a warrant for the blood draw because, *inter alia*, he was by himself with Defendant and would have to get another officer to watch Defendant while he drove to the county jail to get the warrant, about 20 minutes away; he was concerned about the dissipation of the alcohol from Defendant’s blood stream, as it had been over an hour since the accident; and he had to get the blood evidence soon as he could not get an accurate blood sample if Defendant were given any medications for his pain or injuries. At 3:51 a.m., Officer Lippert instructed the nurse to draw Defendant’s blood. A test of this blood sampled revealed an alcohol concentration of 0.15, in excess of the legal limit.

Following testimony, Defendant argued that there was insufficient exigent circumstances to justify the warrantless seizure of the blood evidence. The superior court ruled in open court that Defendant’s Fourth Amendment rights had not been violated because there was sufficient exigent circumstances present, but stated specifically that it was not ruling on the Sixth Amendment “chain of custody” issue.

On 22 August 2013, the superior court issued a written order, with findings of fact and conclusions of law, denying “defendant’s motion to

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suppress” after concluding that there were sufficient exigent circumstances to justify the warrantless blood draw. On the same day, after preserving his right to appeal the superior court’s denial of his motion to suppress, Defendant pled guilty to DWI. As a condition of the plea, the State dismissed the charge of failure to reduce speed. The superior court sentenced Defendant to a term of 12 months imprisonment; this sentence was suspended and Defendant was placed on supervised probation for 18 months. The Court also ordered Defendant to complete 48 hours of community service and “not to drive until licensed to do so.” On 22 August 2013, Defendant filed written notice of appeal from this judgment.

II. Argument

In his only issue on appeal, Defendant contends that the trial court erred in denying his motion to suppress certain blood evidence because there were insufficient exigent circumstances to support the warrantless seizure of that evidence in violation of his Fourth Amendment rights.

A. Preliminary Manner

[1] The State, citing *State v. Golden*, 96 N.C. App. 249, 385 S.E.2d 346 (1989), argues that Defendant waived his right to argue a violation of his Fourth Amendment rights. Specifically, the State contends that none of Defendant’s attempts in superior court to challenge the admission of the blood test based on Fourth Amendment grounds followed N.C. Gen. Stat. § 15A-977(a) (2012), which requires, in part, that (1) the “motion to suppress . . . be in writing[,]” (2) it “state the grounds upon which it is made[,]” and (3) it “be accompanied with an affidavit containing facts supporting the motion.” *Id.* We disagree.

Specifically, the State argues that Defendant’s oral motion to suppress made at the hearing based on the Fourth Amendment was not sufficient to preserve Defendant’s appeal since this motion did not meet the requirement that it be “in writing.” Further, the State argues that Defendant’s written motion to suppress was not sufficient to preserve Defendant’s appeal, since the only ground stated in that motion is based on the Sixth Amendment (chain of custody/confrontation of witnesses) and *not* the Fourth Amendment (exigent circumstances). Finally, the State argues that Defendant’s written motion to dismiss was not sufficient to preserve Defendant’s appeal because – though that motion stated the Fourth Amendment as the ground for the challenge – it was not accompanied by the required “affidavit containing facts supporting the motion.” *See id.*

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We believe that Defendant did satisfy the requirements of N.C. Gen. Stat. § 15A-977(a). Specifically, as the State concedes, Defendant's motion to dismiss – which is based on Fourth Amendment grounds — may be treated as a motion to suppress, pursuant to our decision in *Golden, supra*. We recognize that, though the motion to dismiss sets forth factual allegations to support the motion, the motion was unverified. However, Defendant's motion to suppress based on his Sixth Amendment challenge was verified² and contains substantially the same factual allegations that are contained in Defendant's unverified motion to dismiss. Since the factual allegations in the motion to suppress are verified and since these allegations are sufficient to support Defendant's motion to dismiss, Defendant has satisfied the minimum requirements for a motion to suppress pursuant to N.C. Gen. Stat. § 15A-977(a). Accordingly, we turn to address Defendant's substantive arguments regarding the denial of his motion to suppress and exigent circumstances.

B. Motion to Suppress-Exigent Circumstances**1. Standard of Review**

[2] This Court's review of an appeal from the denial of a defendant's motion to suppress is limited to determining “whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law.” *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). When a defendant fails to challenge the trial court's findings of fact,

they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

Id. at 168, 712 S.E.2d at 878 (citations and quotation marks omitted). On appeal, Defendant challenges only portions of finding of fact 41. Therefore, the remaining findings of fact are binding to us on appeal and deemed to be supported by competent evidence. *See id.* We first turn to Defendant's challenges to the trial court's finding of fact 41, arguing that subsections (a) and (c) of this finding are not supported by competent evidence in the record.

2. Although not initially included in the record on appeal, Defendant made a motion with this Court to amend the record on appeal to include the verification of his motion to suppress. We grant this motion.

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2. The trial court's finding of fact 41

Finding of fact 41(a) states

(a) The first exigent circumstance was the fact that defendant's percentage alcohol [sic] in the his [sic] blood was dissipating and had been for approximately 1 hour and 32 minutes, from the time of the accident until the time the defendant refused a consensual blood draw. Such dissipation destroys the vital evidence in the case. An additional 40 plus minute delay by traveling to the New Hanover County Jail to seek a magistrate's signature on a search warrant would allow further dissipation of alcohol and further evidence to be destroyed.

First, Defendant contends that it was not 1 hour and 32 minutes from the accident until he refused a consensual blood draw, as the trial court found, but 1 hour and 32 minutes from the accident until when his blood was actually drawn. Defendant also argues that Officer Lippert arrived at 2:50 a.m. and "wasted" 20 minutes performing field sobriety tests on Defendant and then "wasted" another 40 minutes between Defendant's refusal and the blood draw, enough time for him to obtain the search warrant and he "simply refused to do so." We find Defendant's arguments unpersuasive.

It appears that Defendant is challenging the first and last sentences of this finding. As to the first sentence, Officer Lippert testified that the accident occurred at 2:19 a.m. Officer Lippert further testified that at 3:50 a.m., when a nurse finally became available to perform a blood draw, Defendant refused to give his consent to the draw. One minute later, the nurse drew Defendant's blood at 3:51 a.m. We do not believe that Officer Lippert "waste[d]" 40 minutes, as Defendant argues, from 3:10 until 3:50 a.m., but he was waiting for a nurse. Therefore, this finding is supported by competent evidence in the record. Defendant's argument may be based on the implied consent rights form which shows 3:10 a.m. as the time that Defendant refused, but Officer Lippert clarified in his testimony that he gave the form to Defendant at 3:10 a.m. but it was not until a nurse arrived at 3:50 a.m. that Defendant refused to give his consent.

As to the last sentence in this finding, Officer Lippert testified that it would have taken 15 or 20 minutes to drive to the county jail to see a magistrate and get a warrant and it would take him some amount of time to fill out the proper search warrant form and did not know how long the

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process would take. Therefore, the trial court's finding that there would have been a "40 plus minute delay" is supported by competent evidence.

We also find Defendant's argument that Officer Lippert "wasted" 20 minutes doing field sobriety tests unpersuasive because it is well understood that Officer Lippert would have to have probable cause in order to obtain the contested blood draw evidence. *See* U.S. Const. Amend. IV. Those sobriety tests would be in furtherance of establishing probable cause. Therefore, Defendant's arguments are overruled.

As to finding of fact 41(c), Defendant contends Officer Lippert's testimony regarding Defendant needing pain medication was "purely hypothetical," and there was no evidence that Defendant needed or was given any pain medication that would interfere with him getting a blood sample. We likewise find these arguments to be without merit.

Officer Lippert testified that when he arrived on the scene of the accident Defendant appeared to be "in some level of pain [and] discomfort[.]," he was taken out of his vehicle and transported to the hospital on a backboard, and, at the hospital, Defendant complained of foot, ankle, knee, and shoulder pain. Officer Lippert testified that he had seen accident victims receive pain medication before and was concerned that pain medication would prevent him from getting an accurate blood test. He further stated that he would not stop or interfere with a person's medical treatment. We are not persuaded by Defendant's argument that no evidence supports finding of fact 41(c) and that Officer Lippert's concerns were merely "hypothetical[.]" Rather, there was competent evidence in the record to support the trial court's finding of fact 41(c) and Defendant's arguments are overruled. We next turn to Defendant's challenges to the trial court's conclusions of law.

3. The trial court's conclusions of law

[3] Defendant contends that the trial court's findings of fact do not support its conclusion of law that sufficient exigent circumstances existed to justify the warrantless collection of his blood sample. Defendant contends that the trial court's findings of fact do not show that Officer Lippert "faced an emergency that justified action without a warrant" as required by *Missouri v. McNeely*, ___ U.S. ___, 185 L. Ed. 2d 696 (2013), for sufficient exigent circumstances. Defendant concludes that the denial of his motion to suppress should be reversed, the evidence suppressed, and his charges dismissed.

Our Supreme Court has stated that "[t]he withdrawal of a blood sample from a person is a search subject to fourth amendment protection."

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State v. Welch, 316 N.C. 578, 585, 342 S.E.2d 789, 793 (1986) (citation omitted). Therefore, “a search warrant must be procured before a suspect may be required to submit to such a procedure unless probable cause and exigent circumstances exist that would justify a warrantless search.” *Id.* Defendant raises no argument regarding probable cause for the warrantless blood draw. Thusly, our review is limited to whether there were sufficient exigent circumstances.

The United States Supreme Court recently held in *Missouri v. McNeely*, *supra*, that the natural dissipation of alcohol in the bloodstream, standing alone, cannot create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant. The inquiry into an exigency is fact-specific and “demands that we evaluate each case of alleged exigency based ‘on its own facts and circumstances.’” *McNeely*, ___ U.S. at ___, 185 L. Ed. 2d at 705 (citation omitted). It stated that in DWI-type investigations, “where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.” *Id.* at ___, 185 L. Ed. 2d at 707. By way of example, the Court stated that there may be “a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer.” *Id.* at ___, 185 L. Ed. 2d at 708. But the Court also recognized that “some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test.” *Id.* at ___, 185 L. Ed. 2d at 707. The Court stated that, for example, “exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process.” *Id.* at ___, 185 L. Ed. 2d at 709. The Court, in affirming the lower court’s ruling, concluded that

[i]n short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Id.

In *State v. Dahlquist*, ___ N.C. App. ___, 750 S.E.2d 580 (2013), *appeal dismissed and disc. review denied*, ___ N.C. ___, ___ S.E.2d ___, 2014 N.C. LEXIS 203 (N.C., 2014), we addressed the effect of the U.S.

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Supreme Court's holding in *McNeely*, *supra*, stating that "the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *Id.* at ___, 750 S.E.2d at 583.

In the present case, we conclude that the trial court's findings support its conclusion that the *totality of the circumstances* showed that exigent circumstances justified the warrantless blood draw. Specifically, the trial court found that Officer Lippert had concerns regarding the dissipation of alcohol from Defendant's blood, as it had been over an hour since the accident when Officer Lippert established sufficient probable cause to make his request for Defendant's blood. Those findings also state Officer Lippert's concerns "due to delays from the warrant application process[.]" See *McNeely*, ___ U.S. at ___, 185 L. Ed. 2d at 709. Its findings show that Officer Lippert did not have the opportunity to investigate the matter adequately until he arrived at the hospital because of Defendant's injuries and need for medical care. Even if he had the opportunity to investigate the matter at the accident scene sufficiently to establish probable cause, unlike the example in *McNeely*, ___ U.S. at ___, 185 L. Ed. 2d at 708, Officer Lippert was investigating the matter by himself and would have had to call and wait for another officer to arrive before he could travel to the magistrate to obtain a search warrant. Its findings show that Officer Lippert's "knowledge of the approximate probable wait time" and "time needed to travel[.]" as being over a 40 minute round trip to the magistrate at the county jail. See *Dahlquist*, ___ N.C. App. at ___, 750 S.E.2d at 583 (holding that there were sufficient exigent circumstances justifying the warrantless blood draw in part because of the officer's knowledge of the travel time and delays as a result of the warrant application process). Additionally, Officer Lippert had the added concern of the administration of pain medication to Defendant. Defendant had been in an accident severe enough that he was placed on a backboard for transportation to the hospital and complained of pain in several parts of his body. There was a reasonable chance if Officer Lippert left him unattended to get a search warrant or waited any longer for the blood draw, Defendant would have been administered pain medication by hospital staff as part of his treatment, contaminating his blood sample.³

3. We note that a defendant can be guilty of impaired driving under N.C. Gen. Stat. § 20-138.1 not only for having "consumed sufficient alcohol" but also for being "under the influence of an impairing substance" or with "any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine." A blood test for Defendant's blood alcohol content could also presumably reveal if he was also under the influence of another "impairing substance" or "Schedule I controlled substance[.]"

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For the foregoing reasons, we affirm the trial court's denial of Defendant's motion to suppress.

AFFIRMED

Judge STROUD and Judge HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
JERROD STEPHON HILL, DEFENDANT

No. COA13-1188

Filed 15 July 2014

1. Sentencing—failure to hold charge conference prior to instructing jury—new trial

The trial court erred in an attempted robbery with a firearm and assault with a deadly weapon inflicting serious injury case when it failed to hold a charge conference prior to instructing the jury during the sentencing phase of the trial, and therefore, the judgment was vacated and remanded for a new trial on sentencing.

2. Sentencing—aggravating factor—acting in concert—attempted armed robbery

Although defendant argued on appeal that the trial court erred in submitting the N.C.G.S. § 15A-1340.16(d)(2) aggravating factor when he was likely convicted of attempted armed robbery under an acting in concert theory, the Supreme Court has recently rejected that argument.

Appeal by defendant from judgments entered 9 August 2011 by Judge Mark E. Klass in Forsyth County Superior Court. Heard in the Court of Appeals 19 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Nancy D. Hardison, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

GEER, Judge.

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Defendant Jerrod Stephon Hill appeals from his convictions of attempted robbery with a firearm and assault with a deadly weapon inflicting serious injury (“ADWISI”). The trial court sentenced defendant in the aggravated range based upon the jury’s determination that two aggravating factors existed. On appeal, defendant makes several arguments regarding the sentencing phase of the trial. We agree with defendant that the trial court erred when it failed to hold a charge conference prior to instructing the jury during the sentencing phase of the trial and, therefore, vacate defendant’s judgment and remand for a new trial on sentencing.

Facts

The State’s evidence tended to show the following facts. On 16 March 2010, Howard Moore was with his friend Little Rick when Rick received a phone call from defendant. Defendant told Rick that he had a plan to rob Michael Dyer, defendant’s friend from high school. According to the plan, defendant, Howard, and Rick would go to Mr. Dyer’s house and Howard would ask to use his bathroom. Once they were inside, they would pin Mr. Dyer down and rob him. Defendant and his friend Jamal Smith had been to the house earlier that day and had seen Mr. Dyer sleeping on the couch.

A few minutes later, defendant and Jamal picked up Howard and Rick in a SUV driven by Jamal, and they headed to Mr. Dyer’s house. On the way there, defendant showed Howard a .22 caliber rifle that he had wrapped in a black shirt.

The men arrived at Mr. Dyer’s house around 1:00 p.m. Mr. Dyer saw the SUV pulling into his driveway and recognized defendant, who had been to his house a few months earlier to smoke marijuana. Mr. Dyer met defendant and Howard, whom Mr. Dyer did not recognize, at the door. Defendant asked Mr. Dyer if Howard could use his bathroom, and Mr. Dyer let them inside. After showing Howard to the bathroom, Mr. Dyer heard someone behind him say, “Hey, homey.” He turned around and saw Rick, whom he did not recognize, pointing a .22 caliber rifle at his head. Then, defendant punched Mr. Dyer in the face, blind-siding him. Howard came out of the bathroom, and Howard, defendant, and Rick began beating Mr. Dyer. Rick hit Mr. Dyer in the head with the butt of the rifle with such force that the rifle broke apart.

Mr. Dyer attempted to fight back, at one point throwing defendant over a chair. Mr. Dyer then pulled out a pocket knife and stabbed Howard in the side and in the buttock. At that point, defendant said “Oh, shit. White boy has a knife[.]” and defendant, Howard, and Rick ran out of the

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house. Mr. Dyer's mother arrived shortly thereafter and called 911. Mr. Dyer was hospitalized and required extensive medical treatment including surgery for a fractured orbital bone and cheek bone, and stitches for lacerations to his head and face. He continues to have problems with the vision in his right eye.

Police officers recovered from Mr. Dyer's house the broken pieces of the butt of the rifle used to beat Mr. Dyer, the knife used to stab Howard, a ski mask, a doo rag with Jamal's DNA on it, and defendant's cell phone. Police questioned Mr. Dyer, who identified defendant as one of the suspects. Later that afternoon, police were alerted when Howard went to the hospital to seek treatment for his stab wounds. Howard was interviewed by police at the hospital, and, although he initially denied any knowledge of the incident, he eventually confessed to participating. Howard agreed to plead guilty to a charge of common law burglary in exchange for his testimony against defendant.

Defendant was indicted on 7 June 2010 for attempted robbery with a dangerous weapon, ADWISI, and assault inflicting serious bodily injury. On 6 July 2011, the State provided defendant with notice that it also intended to prove the following aggravating factors at trial: that defendant (1) induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants in the commission of the offense, and (2) joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

At trial, defendant testified in his own defense that on 16 March 2010, he was coming out of a corner store when he saw Rick and offered to pay Rick for a ride home. Howard, whom defendant did not know, was also in the car. As they were driving, Rick asked defendant if he knew where they could get some marijuana. Defendant directed them to Mr. Dyer's house. When they got there, defendant and Howard met Mr. Dyer on the porch. Defendant asked Mr. Dyer if he had any weed, and Howard asked if he could use the bathroom. Mr. Dyer let them inside, and defendant and Mr. Dyer discussed marijuana while Howard went to the bathroom.

Defendant testified that Howard came out of the bathroom and blindsided Mr. Dyer by punching him in the face. At the same time, Rick came in with a gun pointed at Mr. Dyer's face and said, "Give it up." Defendant stood there in shock at first while Howard and Rick began beating Mr. Dyer. Then, defendant tried to break up the fight. When Mr. Dyer stabbed Howard, defendant heard Rick yell, "White boy got a knife." Defendant

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ran out of the house, and as he was running down the driveway, Rick and Howard pulled up in the car and Rick told defendant, “Get your ass in the car.” Defendant got in because Rick had a pistol in his lap, and he felt threatened. Defendant denied that he saw the rifle before the assault occurred, that he punched Mr. Dyer, or that he intended to rob him.

On cross-examination, the State asked defendant about his interview with Detective Rick Shelton of the Winston-Salem Police Department when he was first arrested. When the State asked if defendant told Detective Shelton that he only got into the car because Rick threatened him with a pistol, defendant claimed that he did say that to Detective Shelton. Defendant also denied telling the detective initially that he did not know Mr. Dyer and then saying, “Oh, yeah, yeah, yeah. I saw Michael at a party on Sunday night in Clemmons where a fight broke out.”

The State then called Detective Shelton as a rebuttal witness and played the videotaped recording of Detective Shelton’s interview with defendant. Detective Shelton’s testimony and the recording showed that defendant never told Detective Shelton that Rick threatened him with a pistol and revealed other inconsistencies in defendant’s testimony.

At the close of all the evidence, the State voluntarily dismissed the charge of assault inflicting serious bodily injury. The jury found defendant guilty of attempted robbery with a dangerous weapon and ADWISI. The court then proceeded to the sentencing phase of the trial to allow the jury to render a verdict on the aggravating factors. Neither party presented additional evidence on the aggravating factors. After each side gave closing arguments, the court instructed the jury with respect to the aggravating factors. The jury returned a verdict finding that both aggravating factors were present.

Defendant did not argue that the trial court should find any mitigating factors, and the trial court sentenced him in the aggravated range to a term of 100 to 129 months imprisonment for attempted robbery with a dangerous weapon and to a consecutive presumptive-range term of 26 to 41 months imprisonment for ADWISI. Defendant filed a petition for writ of certiorari on 24 January 2013, which this Court granted on 4 February 2013.

Discussion

[1] Defendant first argues that the trial court violated N.C. Gen. Stat. § 15A-1231(b) (2013) by failing to hold a charge conference prior to instructing the jury in the sentencing phase of the trial. Although defendant did not raise this issue at trial, he argues that this issue is preserved

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because “when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.” *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

Defendant contends that holding a charge conference is a statutory mandate under N.C. Gen. Stat. § 15A-1231(b), which provides:

Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

With respect to whether holding a charge conference is a statutory mandate, this Court has noted that “‘ordinarily, the word “must” and the word “shall,” in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory[.]’” *State v. Inman*, 174 N.C. App. 567, 570, 621 S.E.2d 306, 309 (2005) (quoting *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978)). Nevertheless, “‘the legislative intent is to be derived from a consideration of the entire statute’” including “‘the importance of the provision involved.’” *Id.* (quoting *House*, 295 N.C. at 203, 244 S.E.2d at 661, 662). “‘Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory.’” *Id.* (quoting *House*, 295 N.C. at 203, 244 S.E.2d at 661-62).

The purpose of a charge conference is to allow the parties to discuss the proposed jury instructions to “insure that the legal issues are appropriately clarified in a manner that assists the jury in understanding the case and in reaching the correct verdict,” Irving Joyner, *Criminal Procedure in North Carolina* § 11.17 (3d ed. 2005), and “to enable counsel to know what instructions will be given so that counsel will be in a position to argue the facts in light of the law to be charged to the jury.”

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State v. Wilson, 354 N.C. 493, 524, 556 S.E.2d 272, 292 (2001) (Butterfield, J., concurring), *overruled on other grounds by State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002). After considering N.C. Gen. Stat. § 15A-1231(b) as a whole, including the importance of allowing the parties an opportunity to be heard regarding jury instructions and the use of the word “must,” we conclude that holding a charge conference is mandatory, and a trial court’s failure to do so is reviewable on appeal even in the absence of an objection at trial.

The State argues, however, that N.C. Gen. Stat. § 15A-1231(b) should not apply to trials regarding the existence of aggravating factors in non-capital cases. The State asserts that N.C. Gen. Stat. § 15A-1340.16(a1) (2013) sets forth all the procedural requirements for sentencing a defendant in the aggravated range and, because N.C. Gen. Stat. § 15A-1340.16(a1) does not specifically require the court to hold a separate charge conference, the trial court was not required to do so. We disagree.

N.C. Gen. Stat. § 15A-1340.16(a1) provides, in pertinent part, that if the defendant does not admit to the existence of an aggravating factor, “only a jury may determine if an aggravating factor is present in an offense.” The statute further provides:

The jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. . . . If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue. A jury selected to determine whether one or more aggravating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.

Id.

The statute goes on to address the procedure to be followed (1) when a defendant admits the aggravating factor, (2) when a defendant pleads guilty to the underlying felony but contests the existence of

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an aggravating factor, and (3) when the State seeks to establish a prior record level point under N.C. Gen. Stat. § 15A-1340.14(b)(7) (2013). *See* N.C. Gen. Stat. § 15A-1340.16(a2), (a3), (a5). The statute also sets out requirements for pleading or giving notice of an intent to use aggravating factors or seek addition of prior record level points. *See* N.C. Gen. Stat. § 15A-1340.16(a4), (a5), (a6).

Nothing in the statute addresses the specifics of how the trial court should conduct a separate sentencing proceeding before the jury that decided the underlying felony charge or a separate sentencing proceeding before a newly empanelled jury. N.C. Gen. Stat. § 15A-1340.16 simply does not attempt to regulate how the trial court should conduct the sentencing proceedings, and we can glean no intent to mandate a different procedure than that which governs trials of criminal offenses. Accordingly, we hold that N.C. Gen. Stat. § 15A-1231 applies to sentencing proceedings under N.C. Gen. Stat. § 15A-1340.16(a1).

If, as occurred in this case, the trial court decides to hold a separate sentencing proceeding on aggravating factors as permitted by N.C. Gen. Stat. § 15A-1340.16(a1), and the parties did not address aggravating factors at the charge conference for the guilt-innocence phase of the trial, N.C. Gen. Stat. § 15A-1231 requires that the trial court hold a separate charge conference before instructing the jury as to the aggravating factor issues. The trial court's failure to do so in this case was error.

We note, however, that N.C. Gen. Stat. § 15A-1231(b) (emphasis added) provides that “[t]he failure of the judge to comply *fully* with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.” In this case, however, the trial court did not comply with N.C. Gen. Stat. § 15A-1231(b) at all.

This Court considered the failure to hold a charge conference under a prior version of N.C. Gen. Stat. § 15A-1231(b) in *State v. Clark*, 71 N.C. App. 55, 57, 322 S.E.2d 176, 177 (1984), *disapproved of on other grounds by State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990). That version included the same requirement of a showing of material prejudice if the trial court failed to “fully” comply with the requirement for a recorded charge conference. *Id.* (quoting N.C. Gen. Stat. § 15A-1231(b) (1983)). However, the 1983 statute only required a recorded charge conference if one of the parties requested it. *Id.*

In *Clark*, the Court held that because the defense counsel had requested a charge conference, the trial court was “mandated . . . to

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conduct a recorded instruction conference under G.S. § 15A-1231(b).” *Id.* at 58, 322 S.E.2d at 178. As in this case, the trial court, however, failed to hold any conference at all, recorded or otherwise. *Id.* Without requiring any showing of prejudice, this Court held “that the trial court’s failure to hold a jury instruction conference requires a new trial.” *Id.*

Under the current version of N.C. Gen. Stat. § 15A-1231(b), the trial court was mandated to hold a charge conference even without a request. Therefore, under *Clark*, the trial court’s failure to hold the mandated conference “requires a new trial.” 71 N.C. App. at 58, 322 S.E.2d at 178.

Even if *Clark* were not controlling, we hold that defendant has shown sufficient prejudice. Here, in addition to not holding a charge conference, the trial court, contrary to the General Rules of Practice, did not, following his charge to the jury, give counsel an opportunity to object to the charge. *See* Gen. R. Pract. Super. and Dist. Ct. 21 (“At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom[.]”). As a result, defense counsel was unable to have any input into the jury instructions at all.

Because of the importance of jury instructions, the role the charge conference plays in ensuring that the instructions are clear and correct and framed in the most effective way for a particular party, and the ambiguities and omissions in the instructions and verdict sheet that defendant has pointed out that could have been corrected during a charge conference, we believe that defendant has shown material prejudice. We, therefore, vacate defendant’s judgment and remand for a new sentencing proceeding.

[2] Given our disposition of this appeal, we need not address defendant’s specific arguments regarding the instructions because they are unlikely to be repeated on remand. We do note, however, that while defendant has argued on appeal that the trial court erred in submitting the N.C. Gen. Stat. § 15A-1340.16(d)(2) aggravating factor when he was likely convicted of attempted armed robbery under an acting in concert theory, the Supreme Court has recently rejected that argument in *State v. Facyson*, ___ N.C. ___, ___, 758 S.E.2d 359, 364 (2014) (holding that because N.C. Gen. Stat. § 15A-1340.16(d)(2) requires evidence that defendant joined with at least two other people to commit the offense while acting in concert requires only one person, “[a]ny evidence that defendant joined with more than one person [is] ‘additional evidence’

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unnecessary to prove that defendant acted in concert in committing the [offense]" (quoting *State v. Thompson*, 309 N.C. 421, 422, 307 S.E.2d 156, 158 (1983)).

Vacated and remanded.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
DAVID FRANKLIN HURT

No. COA09-442-2

Filed 15 July 2014

1. Sentencing—aggravating factor—especially heinous, atrocious, or cruel—sufficient evidence

The trial court did not err in a sentencing hearing on defendant's second-degree murder plea by denying defendant's motion to dismiss the aggravating factor that the offense was especially heinous, atrocious, or cruel. A lack of presence at or participation in a codefendant's gruesome murder does not preclude the submission to the jury of the especially heinous, atrocious, or cruel aggravating factor. Furthermore, in this case, a reasonable inference could have been drawn that defendant did actively participate in the murder of the victim.

2. Sentencing—subpoena—quashed—recitation of basis for guilty plea—not judicial admission

The trial court did not abuse its discretion in a sentencing hearing on defendant's second-degree murder plea by granting the State's motion to quash the subpoena of one of the prosecutors at the hearing on defendant's guilty plea. A recitation of the factual basis for a guilty plea is not a judicial admission. Therefore, the prosecutor's statements regarding the State's acceptance of defendant's guilty plea to second-degree murder did not establish his guilt as merely an aider and abettor rather than an active participant in the murder.

3. Evidence—SBI agent testimony—no prejudice—sentencing

The trial court did not err in a second-degree murder sentencing hearing by overruling defendant's objection and motion to strike

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an SBI agent's testimony. The agent explained that where no DNA match is found, the person in question could not have committed the crime. Contrary to defendant's contention, the agent did not affirmatively state that when a DNA match is found, the subject definitely committed the crime. Even assuming, without deciding, that the testimony lacked relevance, defendant failed to show that any such error was prejudicial.

4. Sentencing—mitigation phase—admission of exhibit—preference for live testimony

The trial court did not err during the mitigation phase of sentencing by excluding defendant's exhibit — a notebook prepared for the previous sentencing proceedings in the same case that contained recitations of another individual's multiple confessions, a forensic blood spatter expert report, and medical reports regarding defendant's alcohol consumption. Instead, the trial court informed defendant of its preference for live testimony and admitted parts of the notebook. Furthermore, defendant failed to show how the trial court's refusal to admit the exhibit in its entirety deprived him of the opportunity to present evidence of a mitigating factor.

Appeal by defendant from judgment entered 4 April 2008 by Judge Thomas D. Haigwood in Caldwell County Superior Court. Originally heard in the Court of Appeals 1 October 2009, with opinion filed 16 November 2010. An opinion reversing the decision of the Court of Appeals and remanding for consideration of issues not previously addressed by this Court was filed by the Supreme Court of North Carolina on 27 June 2013.

Roy Cooper, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

This case is before this Court on remand from the Supreme Court of North Carolina. Our Supreme Court held that for the reasons stated in *State v. Ortiz-Zape*, ___ N.C. ___, 743 S.E.2d 156 (2013), Defendant's rights under the Confrontation Clause were not violated. *State v. Hurt*, ___ N.C. ___, 743 S.E.2d 173 (2013). On remand, we address Defendant's remaining arguments.

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David Franklin Hurt (“Defendant”) appeals from a judgment imposing a sentence in the aggravated range for second-degree murder. Specifically, Defendant alleges the trial court erred by (1) denying his motion to dismiss the aggravating factor due to the State’s failure to establish that the offense was especially heinous, atrocious, or cruel as to him; (2) quashing the subpoena of a former prosecutor, thereby denying Defendant the opportunity to elicit the State’s prior judicial admissions and depriving him of his rights to due process, trial by jury, presentation of a defense, and compulsory process; (3) overruling Defendant’s objection and motion to strike testimonial evidence from a State Bureau of Investigation (“SBI”) agent; and (4) refusing to admit one of Defendant’s exhibits at the mitigation phase of his sentencing hearing. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

The State presented evidence tending to show the following facts: On 26 February 1999, law enforcement officers found Howard Nelson Cook (“Mr. Cook”) dead in his home in Caldwell County. Mr. Cook had sustained blunt force trauma, 12 major stab wounds, and various other “cutting wounds” and abrasions. Earlier that morning, Deputies Jason Beebee (“Deputy Beebee”) and Joel Fish (“Deputy Fish”) of the Catawba County Sheriff’s Office responded to a call from Nancy and Jody Hannah about a white van that appeared to be stuck in their backyard. William Parlier (“Mr. Parlier”) — Mr. Cook’s nephew — and Defendant had been driving the van. As the deputies approached the scene, they encountered Mr. Parlier, who appeared to be intoxicated, walking in the road. The deputies also observed a white van parked in front of a house they later learned belonged to Paula Calloway (“Ms. Calloway”), Defendant’s girlfriend.

The deputies arrested Mr. Parlier on an outstanding warrant and transported him to the Catawba County Jail. The deputies discovered four one-dollar bills with reddish-brown stains on Mr. Parlier’s person. Deputy Fish returned to the location of the white van while other officers went to check on Mr. Cook at his house based on Mr. Parlier’s statement that “[t]he man inside that house killed my uncle.” Deputy David Bates of the Caldwell County Sheriff’s Office found the door of Mr. Cook’s house open and the body of Mr. Cook lying on the floor in a large puddle of blood.

Earlier that evening, Defendant and Mr. Parlier had arrived at Ms. Calloway’s home in a white van. Ms. Calloway and Defendant went to sleep and when they awoke, Mr. Parlier was leaving in the van. Defendant

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and Ms. Calloway went looking for the van and found it stuck in a yard. Defendant freed the van and drove it back to Ms. Calloway's house. Soon thereafter, law enforcement officers came to Ms. Calloway's house, and Deputy Fish found Defendant in Ms. Calloway's bed, under the covers, wearing white pants with darkened reddish-brown stains. Defendant's sweatshirt and boots were also tarnished with reddish-brown spots. The SBI later conducted a DNA analysis on Defendant's sweatshirt and boots and determined that both of these items contained Mr. Cook's blood.

On 15 March 1999, Defendant was indicted by a grand jury in Caldwell County for first-degree murder, burglary, and robbery. Mr. Parlier was also charged with the first-degree murder of Mr. Cook. Pursuant to a plea bargain, Mr. Parlier pled guilty to first-degree murder and received a sentence of life in prison. After Mr. Parlier reneged on his promise to testify against Defendant, the State agreed to negotiate a plea with Defendant, and on 26 August 2002, Defendant pled guilty to second-degree murder in exchange for the dismissal of the remaining charges.¹ The trial judge sentenced Defendant to the maximum aggravated range of 276 to 341 months imprisonment.

Defendant appealed, and on 6 April 2004, this Court vacated and remanded, concluding that the trial court erred in utilizing the fact that Defendant joined with *one* other person in committing the offense as an aggravating factor. *State v. Hurt*, 163 N.C. App. 429, 430, 594 S.E.2d 51, 52 (2004). We explained that N.C. Gen. Stat. § 15A-1340.16(d)(2) provides grounds for sentencing a defendant to the aggravated range in circumstances where despite joining *with more than one person* to commit the offense, the defendant was not charged with committing a conspiracy. *Id.* at 434, 594 S.E.2d at 55. Because the evidence indicated Defendant only conspired with one person — Mr. Parlier — we held that N.C. Gen. Stat. § 15A-1340.16(d)(2) did not apply. *Id.* We further concluded that Defendant's participation with Mr. Parlier was not a proper non-statutory aggravating factor because the General Assembly “carefully crafted the statutory language to require that a defendant join with *more than one* other person to support the finding of an aggravating factor on these grounds.” *Id.* at 435, 594 S.E.2d at 55.

1. In the prosecutor's submission to the trial court of the factual basis for Defendant's plea to second-degree murder, he indicated that without Mr. Parlier's testimony against Defendant, the State's evidence that Mr. Parlier was the one who committed the stabbing was much stronger than the evidence against Defendant and that was the basis for proceeding against Defendant only on a charge of second-degree murder.

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Our Supreme Court reversed the decision of this Court, concluding that the fact that Defendant joined with one other person in the commission of an offense yet was not charged with conspiracy was reasonably related to the purposes of sentencing and was thus a proper non-statutory aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(20). *State v. Hurt*, 359 N.C. 840, 844, 616 S.E.2d 910, 913 (2005). The Court remanded for resentencing on different grounds in accordance with *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed.2d 403 (2004), because Defendant's sentence exceeded the statutory maximum and the upward durational departure from the presumptive range was based solely on judicially-found facts. *Id.* at 845-46, 616 S.E.2d at 913-14. Upon reconsideration, our Supreme Court vacated its earlier opinion in part and remanded the case with instructions to remand to the trial court for a new sentencing hearing. *State v. Hurt*, 361 N.C. 325, 332, 643 S.E.2d 915, 919 (2007). The Supreme Court explained that "[i]f the State seeks an aggravated sentence upon remand, the trial court can consider the evidence then presented to determine which aggravating factors may be submitted to the jury." *Id.*

A jury was empaneled for the purpose of determining the presence of aggravating factors on 2 December 2007 in Caldwell County Superior Court. A mistrial was declared due to misconduct by a juror. A new trial commenced on 31 March 2008. At the outset of the trial, the trial judge informed the jury that Defendant had previously entered a guilty plea for second-degree murder and that the State was now seeking to establish the existence of the aggravating factor that the offense to which Defendant had pled guilty was especially heinous, atrocious, or cruel.

The State presented evidence that Defendant had participated with Mr. Parlier in the vicious beating and stabbing of Mr. Cook. The State's evidence tended to show that (1) Defendant drove himself and Mr. Parlier to Mr. Cook's house; (2) Defendant's clothing and boots tested positive for Mr. Cook's blood; (3) a cigarette butt found outside Mr. Cook's door tested positive for blood and Defendant's DNA; and (4) Defendant drove Mr. Parlier and himself away from the crime scene and to his girlfriend's house.

Special Agent David Freeman ("Special Agent Freeman") of the DNA unit of the forensic biology section of the SBI testified that the end of the cigarette butt containing saliva found outside Mr. Cook's house matched Defendant's DNA and that a pair of blue jeans found in the van had Mr. Cook's blood on them as did Defendant's shirt and boots. The State also presented evidence regarding the specific manner of Mr. Cook's death. Dr. Patrick Lantz, a forensic pathologist and a

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medical examiner for Forsyth County, explained that six of the twelve major stab wounds struck vital organs. He further testified that each of these wounds would have been painful and would have caused bleeding both inside and outside of Mr. Cook's body. Dr. Lantz noted, however, that none of the wounds would have caused an immediate loss of consciousness, meaning that Mr. Cook likely would have been awake for approximately five to ten minutes before he lost consciousness due to blood loss. Dr. Lantz then opined that an additional five to ten minutes probably passed between the time Mr. Cook lost consciousness and the time he died.

At the conclusion of the State's evidence, Defendant made a motion to dismiss the jury's consideration of the aggravating factor that this offense was especially heinous, atrocious, or cruel, arguing that the State had not presented sufficient evidence that Defendant had participated in the actual killing of Mr. Cook. Defendant contended that the State's evidence may have placed Defendant at the crime scene but that it did not establish Defendant's actual participation in the murder itself. The trial court denied Defendant's motion, and Defendant did not present any evidence at this proceeding.

On 3 April 2008, the jury returned a verdict finding that the offense was especially heinous, atrocious, or cruel. The trial court then heard evidence regarding mitigating factors, at which time Defendant argued that the State had offered evidence showing only that he brought Mr. Parlier to Mr. Cook's house, was present at the front door, and had driven himself and Mr. Parlier away from the scene of the crime. The trial court rejected the argument that Defendant was a passive participant in the murder and declined to find any non-statutory mitigating factors. The court found three statutory mitigating factors: (1) that Defendant supported his family; (2) that Defendant had a support system in the community; and (3) that Defendant had a positive employment history or was gainfully employed. The trial court found that the aggravating factor outweighed the factors in mitigation and that an aggravated sentence was therefore appropriate. The trial court imposed a sentence in the maximum aggravated range of 276 to 341 months, and Defendant appealed.

Defendant raised five arguments on appeal. In *State v. Hurt*, 208 N.C. App 1, 702 S.E.2d 82 (2010), this Court held that the introduction of certain forensic evidence violated Defendant's rights under the Confrontation Clause, and, therefore, Defendant was entitled to a new sentencing hearing. For this reason, we declined to address Defendant's remaining arguments on appeal. *Id.* at 6, 702 S.E.2d at 87. Discretionary review was allowed, and our Supreme Court reversed, holding that

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for the reasons stated in *Ortiz-Zape* no violation of the Confrontation Clause had occurred. Therefore, we now consider Defendant's remaining four issues on appeal.

Analysis**I. Denial of Motion to Dismiss**

[1] Defendant first argues that the trial court erred in denying his motion to dismiss due to the State's failure to introduce substantial evidence that the offense was especially heinous, atrocious, or cruel. We disagree.

Questions of sufficiency of the evidence are reviewed under the substantial evidence test. See *State v. Brewington*, 352 N.C. 489, 525-26, 532 S.E.2d 496, 517-18 (2000), *cert. denied*, 531 U.S. 1165, 148 L.Ed.2d 992 (2001). In determining whether sufficient evidence supported the trial court's submission of the especially heinous, atrocious, or cruel aggravator to the jury, the reviewing court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998), *cert. denied*, 526 U.S. 1135, 143 L.Ed.2d 1015 (1999). "If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then it is for the jurors to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt." *State v. Campbell*, 359 N.C. 644, 682, 617 S.E.2d 1, 24 (2005) (citations, quotation marks, and brackets omitted), *cert. denied*, 547 U.S. 1073, 164 L.Ed.2d 523 (2006).

To be substantial, the evidence need not be irrefutable or uncontroverted; it need only be such as would satisfy a reasonable mind as being adequate to support a conclusion. For purposes of a motion to dismiss, evidence is deemed less than substantial if it raises no more than mere suspicion or conjecture as to the defendant's guilt.

State v. Butler, 356 N.C. 141, 145, 567 S.E.2d 137, 139-40 (2002) (citation and internal quotation marks omitted). The inquiry into whether substantial evidence has been presented examines "the sufficiency of the evidence presented but not its weight." *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (citation omitted).

A defendant's role or presence is simply one of the circumstances of a murder to be considered when viewing the evidence in the light most favorable to the State. Evidence showing a less active role by a defendant or absence from the scene does not preclude submission of the aggravating factor to the jury as a matter of sufficiency of the evidence

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but rather goes to the weight that the jury might put toward its consideration of the aggravating factor. *Brewington*, 352 N.C. at 525, 532 S.E.2d at 517 (holding that lack of participation does not preclude submission to jury of especially heinous, atrocious, or cruel aggravating factor).

Defendant contends that the State presented no evidence establishing that he directly participated in the killing of Mr. Cook as no evidence was presented regarding his role in the actual perpetration of the homicide. Accordingly, Defendant argues that the State's failure to submit any evidence that Defendant played an active role in the actual murder precludes a finding by the jury beyond a reasonable doubt that the murder was especially heinous, atrocious, or cruel as to Defendant.

However, our Supreme Court has held that lack of presence at or participation in a codefendant's gruesome murder does not preclude the submission to the jury of the especially heinous, atrocious, or cruel aggravating factor. Rather, it is a matter for the jury to consider in determining the weight to give the aggravating factor. *Id.*

In *Brewington*, the defendant was convicted of first-degree murder, conspiracy to commit murder, and arson. *Id.* at 493, 532 S.E.2d at 499. On appeal, he argued that the jury had impermissibly found the existence of the especially heinous, atrocious, or cruel aggravating factor based on the actions of his codefendants. He conceded that the murders for which he was convicted were especially heinous, atrocious, or cruel. *Id.* at 523, 532 S.E.2d at 516. However, he maintained that although he had planned the murders, the jury could not have found the existence of the aggravating circumstance as to him because there was no evidence that he was personally responsible for the manner in which they were carried out or that he was actually present at the time they were committed. *Id.* Our Supreme Court rejected this argument, explaining that "[t]he fact that defendant was not present when the murders occurred, and that a codefendant actually committed the murders, is a matter that a jury would properly consider in determining the *weight* to give an aggravating circumstance and in balancing the aggravating and mitigating circumstances." *Id.* at 525, 532 S.E.2d at 517.

Similarly, in the present case, Defendant does not dispute the fact that the manner in which Mr. Cook was murdered was sufficient to support the submission of the especially heinous, atrocious, or cruel aggravating factor to the jury. Instead, Defendant asserts that the aggravating factor was erroneously submitted to the jury as to him.

Recognizing that a defendant need not be physically present for the commission of the crime in order for this aggravating factor to be

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submitted to the jury, we believe that in this case, when viewing the evidence in the light most favorable to the State, a reasonable inference can be drawn that Defendant did actively participate in the murder of Mr. Cook. Unlike in *Brewington*, where the evidence established that the defendant was not physically present for the commission of the murders, the circumstantial evidence presented here permits a reasonable inference that Defendant had a personal role in the murder of Mr. Cook in that (1) Defendant had Mr. Cook's blood on him; (2) Defendant drove Mr. Parlier and himself away from the scene of the murder and to his girlfriend's house; and (3) a cigarette butt with blood and Defendant's saliva on it was found at Mr. Cook's home. *See, e.g., State v. Demery*, 113 N.C. App. 58, 61-64, 437 S.E.2d 704, 707-08 (1993) (holding that circumstantial evidence including blood typing and hair analysis was sufficient to submit to jury question of whether defendant was perpetrator of murder). Accordingly, we hold that the trial court did not err in denying Defendant's motion to dismiss.

II. Motion to Quash Subpoena

[2] Defendant next contends that the trial court erred in granting the State's motion to quash the subpoena of Jason Parker ("Mr. Parker"), one of the prosecutors at the 2002 hearing on Defendant's guilty plea. A motion to quash a subpoena is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion.² *State v. Newell*, 82 N.C. App. 707, 709, 348 S.E.2d 158, 160 (1986). An abuse of discretion occurs only where a trial court's ruling was "manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (citation and quotation marks omitted), *cert. denied*, 527 U.S. 1026, 144 L.Ed.2d 779 (1999).

At the hearing, Defendant sought to have Mr. Parker testify about the factual basis the State proffered at Defendant's plea hearing — that the State believed Mr. Parlier killed Mr. Cook and that the State had no physical evidence placing Defendant inside the house when the murder occurred. Defendant argues that Mr. Parker's statements regarding the State's acceptance of Defendant's guilty plea to second-degree

2. In his brief, Defendant argues that the trial court's ruling on this issue deprived him of his constitutional rights to due process, trial by jury, presentation of a defense, and compulsory process. However, Defendant did not raise these constitutional claims in the trial court. Therefore, any such constitutional issues have been waived. *State v. Moses*, 205 N.C. App. 629, 635, 698 S.E.2d 688, 693 (2010).

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murder established his guilt as merely an aider and abettor rather than an active participant in the murder. However, Defendant mischaracterizes Mr. Parker's statements at his plea hearing as judicial admissions. A recitation of the factual basis for a guilty plea is not a judicial admission. Rather, a prosecutor's summary of the facts supporting the plea is merely one procedural mechanism by which a judge may find that a factual basis exists for the plea. *See* N.C. Gen. Stat. § 15A-1022(c) (2013) (prohibiting trial judge from accepting guilty plea "without first determining that there is a factual basis for the plea" which may be based on "[a] statement of the facts by the prosecutor").

A judicial admission, conversely, is "a formal concession made by a party . . . in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. . . . Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence." *Jones v. Durham Anesthesia Assocs., P.A.*, 185 N.C. App. 504, 509, 648 S.E.2d 531, 535 (2007) (citation omitted). Mr. Parker's statements were not "concessions," nor were they offered "for the purpose of withdrawing a particular fact from the realm of dispute." Consequently, we are not persuaded by Defendant's contention that the trial court's decision to quash the subpoena deprived him of the opportunity to elicit binding admissions on the State.

Defendant has failed to demonstrate that the trial court abused its discretion in quashing the subpoena of Mr. Parker. The trial court allowed the State's motion to quash after the State argued there was no compelling reason for Mr. Parker's live testimony and that requiring Mr. Parker to testify in person was unduly burdensome and unreasonable. In quashing the subpoena, the trial court expressly noted that there were other ways for Defendant to show the absence of the especially heinous, atrocious, or cruel aggravator without calling the original prosecutor for Defendant's case to the stand.

Indeed, we note that during the mitigation phase, Defendant was able to introduce the statements previously made by Mr. Parker in his recitation during the plea hearing through the admission of Defendant's Exhibit 9, which contained Mr. Parker's statements as transcribed from the plea hearing. While Defendant maintains that he nonetheless suffered prejudice because Mr. Parker's statements were never before the jury, Defendant does not dispute the fact that he could have introduced this exhibit during the aggravation phase of the proceeding. As such, we cannot say that the trial court abused its discretion in quashing the subpoena.

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III. Denial of Motion to Strike Special Agent Freeman's Testimony

[3] Defendant next argues that the trial court erred in overruling his objection and motion to strike Special Agent Freeman's testimony regarding the general percentages of cases in which the SBI laboratory is able to find a DNA match. Defendant contends that this testimony was irrelevant and undependable "as the jury could not have reliably determined [Defendant's] role from the fact that blood matching the victim was found on his clothing" and that Special Agent Freeman "essentially told the jury that a DNA match establishes that a person committed an offense, whereas the absence of a match establishes that a person did not."

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Although a trial court's relevancy determinations are not discretionary and, therefore, are not reviewed for abuse of discretion, this Court gives such determinations great deference on appeal. *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007). Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.R. Evid. 403. A trial court has discretion whether or not to exclude evidence under Rule 403, and a trial court's determination will only be disturbed upon a showing of an abuse of that discretion. *Campbell*, 359 N.C. at 674, 617 S.E.2d at 20.

At Defendant's sentencing hearing, Special Agent Freeman was asked in what percentage of cases the SBI was able to find a DNA match, and he testified as follows:

Of the cases the [sic] we obtain approximately seventy percent of them are able to determine a match. In approximately thirty percent then we'll say that there isn't a match and that person couldn't have committed the crime.

Even assuming, without deciding, that this testimony lacked relevance, Defendant has failed to show that any such error was prejudicial. *State v. Oliver*, 210 N.C. App. 609, 615, 709 S.E.2d 503, 508 ("The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded. Further, it is the defendant's burden to show prejudice from the admission of evidence." (citations and quotation marks omitted)), *disc. review denied*, 365 N.C. 206, 710 S.E.2d 37 (2011).

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This portion of Special Agent Freeman's testimony was from the preliminary stages of his direct examination, during which he was asked about his qualifications, the nature of DNA, and the process by which DNA matching is done in the laboratory. Special Agent Freeman had not yet begun testifying about Defendant's case in particular; rather, he was speaking generally about the nature of his work.

Moreover, Defendant misconstrues Special Agent Freeman's testimony. Defendant asserts that, in essence, Special Agent Freeman told the jury that a DNA match indicates the person whose DNA was tested actually committed the offense. However, that is not what Special Agent Freeman stated in his testimony. Rather, he explained that where no match is found, the person in question could not have committed the crime. He did *not* affirmatively state that when a match is found, the subject definitely committed the crime.

Defendant has failed to show prejudicial error by the trial court in allowing this testimony. Accordingly, this argument is overruled.

IV. Refusal to Admit Notebook Offered by Defendant

[4] Defendant's final argument on appeal is that the trial court erred in excluding Defendant's Exhibit 3 — a notebook prepared for the 2002 sentencing proceedings that contained recitations of Mr. Parlier's multiple confessions, a forensic blood spatter expert report, and medical reports regarding Defendant's alcohol consumption — during the mitigation phase of sentencing.

N.C. Gen. Stat. § 15A-1340.16(a) requires a trial court to consider evidence of aggravating and mitigating factors during sentencing. The trial court is given wide latitude in conducting sentencing hearings, including the ability to weigh the credibility of the evidence in determining the existence of mitigating factors. *State v. Mabry*, 217 N.C. App. 465, 471, 720 S.E.2d 697, 702 (2011). A defendant who seeks a sentence in the mitigated range bears the burden of persuading the court by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.16(a) (2013).

"Although the formal rules of evidence do not apply in sentencing hearings, evidence offered at sentencing must be both pertinent and dependable. While the court *may* base its sentencing decision on reliable hearsay, [a] defendant is not entitled to consideration of hearsay evidence that is of doubtful credibility." *State v. Reed*, 93 N.C. App. 119, 125, 377 S.E.2d 84, 88 (internal citations and quotation marks omitted and emphasis added), *disc. review denied*, 324 N.C. 580, 381 S.E.2d 779 (1989). The trial court's failure to find a mitigating factor when evidence

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is offered in support of that factor will not be overturned on appeal unless the supporting evidence “is uncontradicted, substantial, and there is no reason to doubt its credibility.” *State v. Lane*, 77 N.C. App. 741, 745, 336 S.E.2d 410, 412 (1985).

Defendant argues that the trial court committed reversible error when it refused to consider his “mitigation report” because it deprived him of the opportunity to present mitigating evidence. We disagree. The trial court declined to admit the notebook marked as Defendant’s Exhibit 3 and instead asked that Defendant call live witnesses from his witness list. In reaching this decision, the trial judge expressed his concerns about considering Defendant’s written documents over live in-court testimony, stating as follows:

[J]ust simply handing something up, a piece of paper writing, unsupported, unauthenticated, over objection — when you handed me a list of ten or fifteen witnesses that you were going to call. . . who have information set forth in this report on mitigation, some of which were brought back from prison units and are in facilities here adjacent to the courtroom and courthouse that could be produced. I’m going to sustain the [State’s] objection. These people are going to be produced in this courtroom.

Thus, the trial court did not refuse to consider Defendant’s mitigation evidence. Instead, the trial court was simply informing Defendant of its preference for live testimony. Furthermore, our review of the transcript reveals that Defendant was, in fact, allowed to introduce certain portions of the documents contained in Defendant’s Exhibit 3, including (1) the affidavit of Mr. Parlier; and (2) parts of the plea hearing. Defendant also offered live testimony from Mr. Parlier and testified on his own behalf during the mitigation phase. Defendant has failed to show how the trial court’s refusal to admit Exhibit 3 in its entirety deprived him of the opportunity to present evidence of a mitigating factor. Therefore, Defendant’s argument on this issue lacks merit.

Conclusion

For these reasons, we conclude that Defendant received a fair trial free from prejudicial error and affirm the sentence imposed by the trial court.

NO PREJUDICIAL ERROR; AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

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STATE OF NORTH CAROLINA

v.

JOSHUA NEAL KING

No. COA13-1402

Filed 15 July 2014

1. Witnesses—qualification as expert by court—implicit in admission of testimony

The trial court's qualification of a doctor as an expert in pediatric medicine as well as in the evaluation and treatment of child sexual abuse was implicit in the trial court's admission of her testimony regarding common behaviors in children who have suffered from sexual abuse.

2. Appeal and Error—preservation of issues—no objection at trial—plain error review not requested—no error

Defendant abandoned his argument concerning a written medical report in a prosecution for rape of a child and other offenses where he did not object at trial, did not request plain error review, and did not make the report a part of the record on appeal.

3. Evidence—characteristics of sexually abused children—no opinion on credibility

There was no error in a prosecution for the rape of a child and other offenses in the trial court allowing the testimony of a doctor which defendant contended presumed that the victim was telling the truth. The testimony properly provided common characteristics the doctor observed in sexually abused children and a possible basis for those characteristics, and not opinion testimony on this victim's credibility.

4. Constitutional Law—effective assistance of counsel—contempt hearing against counsel during trial

Defendant received effective assistance of counsel even though he argued that his counsel's representation was prejudiced by the trial court's failure to grant an adjournment until the next day after defense counsel was the subject of a contempt hearing. The record did not reveal a conflict of interest between defendant and his counsel, defendant neither pointed to an error committed as a result of the criminal contempt hearing nor asserted a burden that would have been alleviated by an overnight recess, counsel was not found

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to be in contempt of court, and defendant was found not guilty on twenty-five of twenty-six charges considered by the jury.

Appeal by defendant from judgment entered 14 January 2013 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 21 May 2014.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn S. Piquant, for the State.

M. Alexander Charns for defendant-appellant.

BRYANT, Judge.

Where a physician testified to common characteristics she had observed in sexually abused children, the trial court did not err in allowing her testimony, and where the trial court denied the State's motion to hold defense counsel in criminal contempt, defendant did not receive ineffective assistance of counsel.

On 12 September 2011, a Buncombe County Grand Jury indicted defendant on thirteen counts of indecent liberties with a child, two counts of rape of a child by an adult, and eleven counts of statutory rape. Each indictment alleged that the victim was Kimberly¹, a girl age twelve or thirteen years old depending on the date of the offense. A jury trial commenced during the 7 January 2013 Criminal Session of Buncombe County Superior Court, the Honorable Alan Z. Thornburg, Judge presiding.

The evidence presented tended to show that Kimberly was born in 1997 and that she had two younger brothers. From the time she was six months old, Kimberly lived with her paternal grandmother. In 2009, when she was twelve years of age, Kimberly left her grandmother's residence and went to live with her mother and two brothers. Kimberly's mother was living with defendant Joshua Neal King, whom she later married. Living with her mother provided Kimberly with more freedom: "I got to go out with my friends a lot more. They got to come over a lot more. I used to drink and do drugs." Kimberly testified that she and her mother used drugs together.

1. Pursuant to Rule 3.1(b) of our Rules of Appellate Procedure, we use a pseudonym to protect the identity of the juvenile.

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On the evening of 16 March 2010, Kimberly's mother was at work; Kimberly was at home with defendant and her two brothers.

A. . . . I went to bed earlier that night and woke up and [defendant] was on top of me, and I had all my clothes off and I was in their bed.

. . .

Q. Do you remember what he had on?

A. A shirt.

. . .

Q. And what happened?

A. He did what I said he did.

Q. Okay. Is that when you said that he put his penis in your vagina?

A. Yes.

Q. What did you do?

A. I yelled for my brother.

Kimberly testified that defendant had her perform sexual acts on many occasions from March through August 2010.

Detective David Shroat, working in the Criminal Investigations Unit of the Buncombe County Sheriff's Department, became involved with the case on 30 August 2010 after receiving a report from the Department of Social Services. Detective Shroat testified that per the report, "[Kimberly's] mother was working nights and [Kimberly] went to bed. And at some point in time, she woke up and [defendant] was on top of her, and she screamed." Detective Shroat spoke with defendant on 21 September 2010. After having his statement transcribed and read back to him, defendant verbally acknowledged his words and signed his name to the statement. The statement was admitted at trial.

Per his statement, defendant "drunk probably a twelve pack" one night; he told the children to go to sleep; and he went to bed. At some point, defendant thought his wife had gotten into the bed. "I discovered it was [Kimberly] . . . I told her to go back to her room. . . . I did rub on her under the blanket with my penis. I don't know if I penetrated her or not." Defendant did not admit to any other instance of sexual contact or activity with Kimberly.

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Pediatrician Dr. Sarah Monahan-Estes, working at the Mission Children's Hospital, examined Kimberly on 29 August 2012. Dr. Monahan-Estes testified to the results of her examination and in part to common characteristics she had observed in sexually abused children.

Following the close of the evidence, the jury found defendant not guilty on twenty-five charges and found defendant guilty on one count of indecent liberties with a child occurring on 16 March 2010. The jury also found as an aggravating factor that "Defendant took advantage of a position of trust or confidence . . . to commit the offense." The trial court entered judgment in accordance with the jury verdict and sentenced defendant to an active term of 16 to 20 months. Defendant appeals.

On appeal, defendant raises the following issues: (I) whether the trial court erred by allowing a physician to testify; and (II) whether defendant received ineffective assistance of counsel.

I

[1] Defendant first argues that the trial court erred in allowing Dr. Monahan-Estes, the pediatrician who examined Kimberly following her report of sexual assaults, to testify as to Kimberly's veracity. Specifically, defendant contends that Dr. Monahan-Estes' written report, which was published to the jury, explained why Kimberly did not initially tell the whole truth and that Dr. Monahan-Estes' testimony presumed Kimberly was telling the truth and presumed a history of sexual abuse. We disagree.

Defendant cites the opinion of this Court in *State v. Ryan* for the proposition that "[o]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." ____ N.C. App. ____, ____, 734 S.E.2d 598, 604 (2012) (citation and quotations omitted), *rev. dismissed*, 366 N.C. 433, 736 S.E.2d 188, *and writ denied*, *rev. denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

Initially, we note that Dr. Monahan-Estes was not formally qualified as an expert. To address this discrepancy, we find guidance in the opinion of our Supreme Court in *State v. Aguillo*, 322 N.C. 818, 370 S.E.2d 676 (1988), wherein the defendant challenged the admission of testimony from two witnesses addressing the typical characteristics of sexually abused children. One witness, a Department of Social Services' case worker, having been employed as such for fourteen years, had investigated between twenty-five and thirty cases of child sexual

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abuse. The victim confided in the witness about the abuse the defendant had inflicted. The second witness, a Sheriff's Department juvenile investigator, had been employed as such for seven years and had investigated over one hundred cases of child sexual abuse. *Id.* at 820-21, 370 S.E.2d at 677. The defendant argued on appeal that the evidence was improper because "the witnesses were not qualified as experts and [] their testimony fail[ed] as lay opinion because it was not rationally based on the perceptions of the witness." *Id.* at 820, 370 S.E.2d at 677. Our Supreme Court reasoned that "[i]t [was] evident that the nature of their jobs and the experience which [the witnesses] possessed made them better qualified than the jury to form an opinion as to the characteristics of abused children." *Id.* at 821, 370 S.E.2d at 677. The Court went on to hold that "the finding that [each] witness [was] an expert is implicit in the trial court's ruling admitting the opinion testimony." *Id.*; see also N.C. Gen. Stat. § 8C-1, Rule 702(a) (2013) ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion . . .").

Dr. Monahan-Estes' testimony began with her educational background, including where she completed her undergraduate studies, her medical school education, where she completed her pediatric residency, and where she completed an additional two-year fellowship in child abuse pediatrics – during which she saw only sexually abused, physically abused, or neglected children. Dr. Monahan-Estes testified that she currently worked in a child abuse clinic seeing children who are suspected of having any history of sexual abuse, physical abuse or neglect. During the course of the investigation into allegations of sexual abuse, Dr. Monahan-Estes interviewed Kimberly.

At trial, Dr. Monahan-Estes testified that when a child is suspected of suffering from abuse, "you want to assure that they don't have any injuries or issues that are resulting because of that abuse that need medical attention or mental health attention." Dr. Monahan-Estes testified to the typical process she goes through in performing a child medical evaluation, with specific regard to an evaluation done where sexual abuse is suspected. She also testified to the limitations of the examination and common behaviors she has observed in her experience.

[W]e very rarely see kids who [sic] the abuse or trauma has occurred and then they immediately tell someone so we can examine them. . . . In the cases that I typically see

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in clinic, these disclosures have occurred days, weeks, months, years after the sexual abuse has occurred

. . . .

[W]e see all kinds of behavioral and emotional dysfunction or disorders in children who have a history of sexual abuse. These kids typically have an increased frequency of being depressed or having mental health issues, substance abuse. They tend to act out, aggressive behavioral issues in school. They have increased risk of school failure. These children typically get in trouble with the law, delinquency, they'll be arrested, they sexually act out. There's a whole host of issues that are increased in children who have a history of sexual abuse.

We hold that the trial court's qualification of Dr. Monahan-Estes as an expert in pediatric medicine as well as the evaluation and treatment of child sexual abuse is implicit in the trial court's admission of her testimony regarding common behaviors in children who have suffered from sexual abuse.

[2] In challenging the admission of Dr. Monahan-Estes' written report into evidence, defendant contends that Dr. Monahan-Estes "explained why [Kimberly] didn't initially tell the entire truth." We first note that defendant did not object to the admission of the report at trial. Thus, the admission of this evidence would be subject to plain error review only, and upon the request of defendant. Defendant has failed to request plain error review of this issue. Further, defendant has failed to make Dr. Monahan-Estes' report a part of the record on appeal. Therefore, we are precluded from considering the contents of the report, and we must consider defendant's argument abandoned. *See* N.C. R. App. P. 9(a) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal"); *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 161, 356 S.E.2d 912, 915 (1987) ("This Court may not consider documents which have not properly been made a part of the record on appeal." (citing *Elliott v. Goss*, 254 N.C. 508, 119 S.E.2d 192 (1961))).

[3] Defendant challenges Dr. Monahan-Estes' testimony as presuming that Kimberly was telling the truth. Specifically, defendant challenges the following:

Q. . . . In your training and experience, are there reasons that you have personally observed that children may not always tell all of the allegations to start?

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...

THE WITNESS: Yes. It's very common that a child either does not initially disclose or only partially discloses.

One of the biggest issues is frequently the alleged perpetrator is a parent or a parental figure or someone that they love and trust, so they don't want to get them in trouble. They're ashamed, they're afraid, they've been threatened or bribed to try not to disclose.

If another family member who is not the alleged perpetrator, but say another parent or another parental figure doesn't believe the child, then they'll frequently encourage them not to tell, or children sometimes – there will be negative consequences to their disclosure. So they tell a little bit about what happens and then all kinds of things come into play. They're taken out of their home, they're taken away from their siblings, they're taken away from both of their parents. And they see these negative consequences and they don't want them to continue, so they'll only tell little bits of what happened.

In *State v. Hall*, our Supreme Court, analyzing its prior opinion in *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987), stated

that expert testimony on the symptoms and characteristics of sexually abused children is admissible to assist the jury in understanding the behavior patterns of sexually abused children. Furthermore, [the Court] allowed evidence that a particular child's symptoms were consistent with those of sexual or physical abuse victims, but only to aid the jury in assessing the complainant's credibility.

State v. Hall, 330 N.C. 808, 817, 412 S.E.2d 883, 887 (1992) (citation omitted); compare *State v. Stancil*, 355 N.C. 266-67, 559 S.E.2d 788, 789 (2002) ("In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred . . . such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." (citing *State v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992)) (citations omitted)).

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We view Dr. Monahan-Estes' testimony as properly providing common characteristics she observed in sexually abused children and a possible basis for those characteristics, and not opinion testimony on Kimberly's credibility. Therefore, as there was no error by the trial court in allowing the testimony of Dr. Monahan-Estes, defendant's argument is overruled.

II

[4] Next, defendant argues he was denied effective assistance of counsel. Specifically, the trial court's denial of defense counsel's request for an evening recess following defense counsel having to defend himself against a criminal contempt charge prejudiced defense counsel's ability to represent defendant. We disagree.

"The right to effective assistance of counsel includes the right to representation that is free from conflicts of interest." *State v. Choudhry*, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011) (citations and quotations omitted). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Augustine*, 359 N.C. 709, 718, 616 S.E.2d 515, 524 (2005) (quoting *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985)).

In order to meet this burden defendant must satisfy a two part test.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 694 (1984)); see also, e.g., *Choudhry*, 365 N.C. at 219, 717 S.E.2d at 352 ("[W]hen the claim of ineffective assistance is based upon an actual, as opposed to a potential, conflict of interest . . . a defendant may not be required to demonstrate prejudice under *Strickland* to obtain relief." (citations omitted)).

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Defendant's argument is predicated on the assertion that defense counsel was burdened by a conflict of interest; however, the record does not reveal such a conflict.

On 9 January 2010, in the morning of the third day of trial, the prosecutor filed a motion requesting that defense counsel be held in criminal contempt as well as a corresponding motion for a mistrial following defendant's cross-examination of the victim the day before. In its motion, the prosecutor contended that following an in camera hearing to address the admissibility of evidence in light of Rule 412, "Rape or sex offense cases; relevance of victim's past behavior," and the trial court's exclusion of the evidence proffered, defendant proceeded to question Kimberly about her prior sexual encounters in violation of the court's order. A hearing on the State's motion was held that morning. A review of the trial transcript reveals a brief hearing. The State presented its motion; defense counsel introduced an attorney who would represent him; defense counsel's attorney notified the court that he was unfamiliar with any of the underlying facts – including the allegations in the State's motion, and asked that if the trial court was "seriously considering" the motion that the hearing be postponed. The State consented to a postponement of the hearing; at which point, the trial court declared that the State's motion was one for direct contempt and that the court had reviewed the transcript of defense counsel's examination. The trial court ruled that defense counsel "did not act willfully or with gross negligence, and the acts were not done deliberately and purposefully in violation of the law without regard or justification or excuse, and [this court] fails to find him in contempt of court." The trial court subsequently denied the State's motion for a mistrial. Following this denial, defense counsel asked for an adjournment: "I'm very offended by this and it's sort of knocked me off my game, if you will. And I don't want to be sitting here thinking about my issues about this when I'm supposed to be giving my best interest to my client." Defense counsel requested an adjournment until the next morning "to kind of calm down and get over this[.]" At 11:38 a.m., the trial court called a recess until 2:00 p.m.

We see no conflict of interest between trial counsel and defendant. Furthermore, defendant neither points to an error committed as a result of trial counsel's participation in the criminal contempt hearing nor asserts what burden would have been alleviated by an overnight recess. Even though counsel was the subject of a contempt hearing during his representation of defendant, counsel was found to be not in contempt of court. There is nothing in the record to support defendant's assertion of a conflict of interest. On the contrary, defendant was found not guilty

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on twenty-five of twenty-six charges considered by the jury. Defense counsel's zealous representation of defendant, clearly revealed in the record, can in no way be deemed ineffective based on a conflict of interest or any other theory. Defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness. *See Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248. Accordingly, we overrule defendant's argument.

No error.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
SHANEEQUAH NICOLE WALL, DEFENDANT

No. COA14-176

Filed 15 July 2014

Jurisdiction—subject matter jurisdiction—appeal from judgment entered in district court—conviction on magistrate's order—no legal authority in superior court

The superior court lacked legal authority and, therefore, was without subject matter jurisdiction to try defendant on the offense alleged in the misdemeanor statement of charges when defendant was appealing from the judgment entered in district court after a conviction on a magistrate's order. Defendant's conviction for resisting a public officer was vacated.

Appeal by defendant from judgment entered 9 October 2013 by Judge Mark E. Klass in Richmond County Superior Court. Heard in the Court of Appeals 3 June 2014.

Attorney General Roy Cooper, by Senior Deputy Attorney General Robert T. Hargett, for the State.

Michelle FormyDuval Lynch, for defendant.

ELMORE, Judge.

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On 9 October 2013, a jury found Shaneequah Nicole Wall (“defendant”) guilty of resisting a public officer. The trial court sentenced defendant to 45 days imprisonment, suspended, and placed her on supervised probation for 12 months. Defendant gave notice of appeal in open court. We hold that the Richmond County Superior Court lacked legal authority and, therefore, was without subject matter jurisdiction to try defendant on the offense alleged in the misdemeanor statement of charges when defendant was appealing from the judgment entered in district court after a conviction on a magistrate’s order. We vacate defendant’s conviction.

I. BACKGROUND

Based on the record evidence, which is conflicting on occasion, the facts of this case are as follows: On 18 September 2012, the Richmond County Sheriff’s Office received a warrant for the arrest of William Wall, Sr. (“Wall Sr.”) and an emergency child custody order for William Wall, Jr. (“Jr.”), Wall Sr.’s minor child, from the Osceola County Sheriff’s Office in Florida. The child custody order was based on allegations of abuse or neglect and indicated that Richmond County was to take immediate custody of Jr., who was 20 months old. The custody order stated that Jr. could be found at 127 Logan Park in the city of Rockingham.

Deputy Cory Jones (“Deputy Jones”) with the Richmond County Sheriff’s Office was dispatched to the Logan Park address. As Deputy Jones entered Wall Sr.’s neighborhood, he spotted Wall Sr. driving out. Deputy Jones stopped the truck and arrested Wall Sr. Deputy Jones informed passenger Felicia Wall, (Wall Sr.’s daughter) of the arrest warrant for her father and of the child custody order for Jr. Felicia Wall drove Wall Sr.’s truck to the Logan Park residence as Deputy Jones followed in a marked patrol car.

When he arrived at the residence, Deputy Jones stood in the doorway and identified himself as a sheriff’s deputy to Rosa Wall, Jr.’s paternal grandmother and the apparent home owner. Deputy Jones informed Rosa Wall of the warrant and of the child custody order. Meg Demayo with the Richmond County Department of Social Services and Lieutenant Mike Burns (“Lieutenant Burns”) met Deputy Jones at the residence. Defendant and Felicia Wall were present as well.

Lieutenant Burns testified that there were two minor children in the home. Lieutenant Burns asked Rosa Wall to identify Jr. Initially, Rosa Wall said that Jr. was not in the residence. However, she later

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confirmed that Jr. was in the residence, that he was “fine,” and that he was “not going nowhere.” The record discloses that defendant, Felicia Wall, and Rosa Wall each refused to identify Jr. when asked to do so by law enforcement. Pointing to the child later identified as Jr., Deputy Jones specifically asked defendant; “Whose baby is that?” Defendant responded; “His mama is on the way.” Lieutenant Burns warned: “If I find out that either of these two children in this home is in fact the child William Wall, Jr. that I’m looking for, everybody in the residence will go to jail.” After approximately two hours, Florida authorities transmitted a photograph of Jr. and the officers were able to identify him and place him in DSS custody.

The video footage illustrates, and Deputy Jones admits, that the officers never presented the emergency child custody order to defendant, Rosa Wall, or Felicia Wall. Lieutenant Burns testified that he had the emergency child custody order in his possession; however, he stated that he did not feel it was necessary to show it until one of the women affirmatively identified Jr.

Defendant, Felicia Wall, and Rosa Wall were each arrested based on their refusal to identify Jr. Lieutenant Burns told the women; “We’re arresting you for resisting—for lying to us.” On 6 December 2012, a magistrate’s order charged defendant with resisting a public officer, § 14-223, and giving fictitious information to a public officer, § 20-29, for the 18 September 2012 incident. Defendant was tried on the magistrate’s order and found guilty of resisting a public officer on 6 December 2013. The fictitious information charge was dismissed.

Defendant appealed the district court judgment to Richmond County Superior Court for a trial *de novo*. On 2 July 2013, the State filed a misdemeanor statement of charges in superior court. Defendant was tried on the misdemeanor statement of charges and found guilty of resisting a public officer on 9 October 2013. Defendant now appeals.

II. ANALYSIS

Defendant argues that the superior court lacked subject matter jurisdiction to try her on a misdemeanor statement of charges filed in superior court for an alleged 18 September 2012 violation of § 14-223 because defendant was tried and convicted on a magistrate’s order in district court. We agree.

A “statement of charges” is governed, in relevant part, by the following provisions of N.C. Gen. Stat. § 15A-922 (2013):

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(d) Statement of Charges upon Determination of Prosecutor.—The prosecutor may file a statement of charges upon his own determination at any time prior to arraignment in the district court. It may charge the same offenses as the citation, criminal summons, warrant for arrest, or magistrate’s order or additional or different offenses.

(e) Objection to Sufficiency of Criminal Summons; Warrant for Arrest or Magistrate’s Order as Pleading.—If the defendant by appropriate motion objects to the sufficiency of a criminal summons, warrant for arrest, or magistrate’s order as a pleading, at the time of or after arraignment in the district court or upon trial de novo in the superior court, and the judge rules that the pleading is insufficient, the prosecutor may file a statement of charges, but a statement of charges filed pursuant to this authorization may not change the nature of the offense.

(f) Amendment of Pleadings prior to or after Final Judgment.—A statement of charges, criminal summons, warrant for arrest, citation, or magistrate’s order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged.

N.C. Gen. Stat. § 15A-922 (2013).

The crux of defendant’s issue is that the State’s filing of the misdemeanor statement of charges was untimely and therefore impermissible. We agree. Subsection (d) of N.C. Gen. Stat. § 15A-922 clearly provides that “[t]he prosecutor may file a statement of charges upon his own determination at *any time prior to arraignment in the district court.*” After arraignment, the State may only file a statement of charges when the defendant (1) objects to the sufficiency of the criminal summons and (2) the trial court rules that the pleading is in fact insufficient. N.C. Gen. Stat. § 15A-922(e). While subsection (f) allows the charging instrument to be amended prior to or after a final judgment is entered, this does not grant the State authority to change the form of the charging instrument; i.e., the State cannot “amend” a magistrate’s order by filing a misdemeanor statement of charges. Doing so would change the nature of the original pleading entirely. Accordingly, the State has a limited window in which it may file a statement of charges on its own accord, and that is prior to arraignment.

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To further illustrate this point, we look to *State v. Killian*, 61 N.C. App. 155, 158, 300 S.E.2d 257, 259 (1983), a case in which the State similarly filed a statement of charges in superior court after the defendant was tried and convicted on a warrant in district court. On appeal, this Court vacated the superior court's judgment for want of jurisdiction on the basis that the statement of charges alleged a separate statutory violation than that charged in the warrant. *Id.* at 158, 300 S.E.2d at 259. However, assuming *arguendo* that the statement of charges did not change the nature of the offense charged, this Court opined that the State's filing in superior court was nevertheless "untimely and thereby without legal authorization." *Id.* at 157, 300 S.E.2d at 259. We noted that the record contained no motion by the defendant objecting to the sufficiency of the original warrant and held, "[t]he statement of charges was filed by the prosecutor 'upon his own determination'; and that could only be done 'prior to arraignment in the district court,' not upon trial *de novo* on appeal to superior court." *Id.*

Here, the State did not file the statement of charges prior to defendant's arraignment in district court. As in *Killian*, the record similarly discloses that no motion was made by defendant objecting to the sufficiency of the magistrate's order. Thus, the trial court was not afforded the opportunity to rule on whether the magistrate's order was sufficient. Nonetheless, the prosecutor "upon his own determination" filed the misdemeanor statement of charges seven months after defendant appealed the district court judgment to superior court. This filing was "untimely and thereby without legal authorization." Thus, the superior court had no jurisdiction to try defendant for the new offense alleged in the statement of charges. Defendant's conviction must be vacated. Defendant's remaining issues on appeal are moot.

Vacated.

Judges McGEE and HUNTER, Robert C., concur.

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STATE OF NORTH CAROLINA

v.

ROBERT LEROY WILLIAMS

No. COA13-1280

Filed 15 July 2014

1. Appeal and Error—writ of certiorari—notice of appeal

Defendant's petition for writ of certiorari was denied and the Court of Appeals proceeded to the merits of his appeal. Defendant's written notice of appeal from the order directing his enrollment in a satellite-based monitoring program was not fatally defective since defendant's intent to appeal could be fairly inferred and the State provided no indication it was misled by defendant.

2. Satellite-Based Monitoring—natural life—due process—rational relation

The trial court did not err in a second-degree rape case by imposing upon defendant enrollment in a satellite-based monitoring program for his natural life. Continuous monitoring as a result of defendant's participation in a satellite-based monitoring program did not violate defendant's substantive due process rights and the monitoring was rationally related to a legitimate governmental purpose.

Appeal by defendant from order entered 19 August 2013 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

BRYANT, Judge.

Because continuous monitoring as a result of defendant's participation in a satellite-based monitoring program does not violate defendant's substantive due process rights and because the monitoring is rationally related to a legitimate governmental purpose, we affirm the order of the trial court imposing upon defendant enrollment in a satellite-based monitoring program for his natural life.

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On 27 April 2007 in Mecklenburg County Superior Court, defendant Robert Leroy Williams entered an *Alford* plea to two counts of second-degree rape. The State dismissed one count of first-degree sex offense, one count of first-degree kidnapping, one count of second-degree kidnapping, and two counts of first-degree rape. The trial court entered a consolidated judgment in accordance with defendant's plea and sentenced defendant to an active term of 58 to 79 months.

On 27 April 2012, the State filed a motion to determine whether defendant was required to enroll in the sex offender satellite monitoring program. A satellite monitoring bring-back hearing was held before the Honorable Robert C. Ervin on 19 August 2013 during the criminal session of Mecklenburg County Superior Court.

During the hearing, the State presented the following background for defendant's second-degree rape conviction. Defendant and his victim were neighbors. The victim had previously rejected defendant's advances and request for a date. Defendant invited the victim to his residence to watch a video. Once inside, defendant extended a further invitation to view hats in his bedroom. In his bedroom, defendant kissed the victim, and the victim attempted to pull away. Defendant then produced a knife and later a gun. Defendant forced the victim to perform fellatio and engage in sexual intercourse. When allowed to leave, the victim immediately reported the forced sexual assault.

In an order entered 19 August 2013, the trial court made judicial findings that defendant's conviction for second-degree rape was a reportable conviction as defined by G.S. 14-208.6(4) and that his was an aggravated offense. Defendant was ordered to enroll in satellite-based monitoring for the remainder of his natural life. Defendant appeals.

[1] We first note that although defendant filed a written notice of appeal from the order directing his enrollment in a satellite-based monitoring program, defendant filed with this Court a petition for writ of certiorari to allow review of the trial court order, asserting that his written notice of appeal was defective. Specifically, defendant states that his notice of appeal fails to indicate to which court his appeal was to be taken and that he served his notice on the State via email. For the reasons stated herein, we determine defendant's notice of appeal is not fatally defective; therefore, we deny defendant's petition for writ of certiorari and proceed to the merits of his appeal.

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Any party entitled by law to appeal from a judgment or order rendered by a judge in superior or district court in a civil action or in a special proceeding may take appeal by giving notice of appeal within the time, in the manner, and with the effect provided in the rules of appellate procedure.

N.C. Gen. Stat. § 1-279.1 (2013). As to the content of the notice of appeal, our Rules of Appellate Procedure state that the notice “shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and *the court to which appeal is taken . . .*” N.C. R. App. P. 3(d) (2013).

“The ‘fairly inferred’ doctrine ensures that a violation of Rule 3(d) results in dismissal only where the appellee is prejudiced by the appellant’s mistake.” *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011). In *Phelps Staffing*, the plaintiff failed to designate within the notice of appeal the court to which the appeal was to be taken.

Plaintiff’s notice of appeal does not designate *any* court as the proper venue for its appeal. Plaintiff’s error is a complete omission of the content requirement as set forth in Rule 3(d). However, this Court has liberally construed this requirement and has specifically held that a plaintiff’s failure to designate this Court in its notice of appeal is not fatal to the appeal where the plaintiff’s intent to appeal can be fairly inferred and the defendants are not misled by the plaintiff’s mistake.

Id. at 410, 720 S.E.2d at 791.

Here, the State’s response to defendant’s petition for writ of certiorari does not indicate that it was misled by defendant’s failure to indicate the court to which the appeal was to be made. The State does not contest defendant’s right to appeal and even suggests that despite the cited defects, this Court may grant a writ of certiorari to review the matter.

As to the service of his notice of appeal upon the opposing party, defendant acknowledges that he served his notice of appeal on the State by email.

“The requirement of timely filing and service of notice of appeal is jurisdictional . . .” *Smith v. Smith*, 43 N.C. App. 338, 339, 258 S.E.2d 833, 835 (1979) (citation omitted). However, a dissenting opinion adopted by our Supreme Court held that “the service of the Notice of Appeal

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is a matter that may be waived by the conduct of the parties.” *Hale v. Afro-Am. Arts Int’l*, 110 N.C. App. 621, 625, 430 S.E.2d 457, 459 (Wynn, J., dissent), *rev’d for the reasons stated in the dissenting opinion*, 335 N.C. 231, 436 S.E.2d 588 (1993). The dissenting opinion proposed that the service of the notice of appeal was akin to the service of a complaint conferring personal jurisdiction upon a trial court. “When the defendant has been duly served with summons personally within the State, or has accepted service *or has voluntarily appeared in court*, jurisdiction over the person exists and the court may proceed to render a personal judgment” *Id.* at 625, 430 S.E.2d at 460 (citation and quotations omitted). “[B]y analogy . . . where the appellee failed, by motion or otherwise, to raise [an] issue as to service of notice in either the trial court or in this Court and has proceeded to file a brief arguing the merits of the case, . . . [the appellee] has waived service of notice [of appeal]” *Id.* at 626, 430 S.E.2d at 460.

Here, in its response to defendant’s petition, the State acknowledges that defendant’s notice of appeal was served via email but does not further contest the service. Furthermore, the State filed a brief addressing the merits of defendant’s arguments presented on appeal. Thus, the State has waived service of notice of appeal. *See id.*

Accordingly, as defendant’s intent to appeal can be fairly inferred and the State provides no indication it was misled by the defendant’s mistake, we do not dismiss defendant’s appeal on the basis of a defect in the notice of appeal. *See Phelps Staffing, LLC*, ___ N.C. App. at ___, 720 S.E.2d at 791. And, as the State has waived service of the notice of appeal, *see Afro-Am. Arts Int’l, Inc.*, 110 N.C. App. at 625, 430 S.E.2d at 460 (Wynn, J., dissent), we deny defendant’s petition for writ of certiorari and proceed to the merits of his appeal. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197–98, 657 S.E.2d 361, 365 (2008) (“A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal. . . . [However,] [w]e stress that a party’s failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal.” (citations omitted)).

[2] On appeal, defendant argues that the imposition of lifetime satellite-based monitoring violates his substantive due process rights by continuous government monitoring or in the alternative, by failing to be rationally related to the purpose of protecting the public from recidivism.

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Defendant first argues that, as applied to him, North Carolina General Statutes, section 14-208.40B(c), violates substantive due process by impermissibly infringing upon his right to be free from government monitoring of his location when monitoring is not narrowly tailored to the purpose of protecting the public from recidivism, and lifetime monitoring was imposed without consideration of defendant's low risk for reoffending. We disagree.

"An appellate court reviews conclusions of law pertaining to a constitutional matter *de novo*." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted).

Pursuant to the United States Constitution, "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST., amend. XIV, § 1. The North Carolina Constitution provides that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19. Our Supreme Court has held that "[t]he term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (citation and quotations omitted).

The Due Process Clause provides two types of protection – substantive and procedural due process. *See State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998).

"Substantive due process" protection prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty. "Procedural due process" protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner.

Id.

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were

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sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

Washington v. Glucksberg, 521 U.S. 702, 720-21, 138 L. Ed. 2d 772, 787-88 (1997) (citations and quotations omitted). “By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field.” *Id.* at 720, 138 L. Ed. 2d at 787 (citation and quotations omitted).

Defendant argues that General Statutes, section 14-208.40B(c), the statute authorizing the court to compel defendant’s enrollment in a life-time satellite-based monitoring (“SBM”) program, impermissibly infringes upon his fundamental right to be free from continuous surveillance.

In support of his contention, defendant cites Justice Alito’s concurrence in *United States v. Jones*, 565 U.S. ___, 181 L. Ed. 2d 911 (2012). The *Jones* Court considered whether a law enforcement agency’s monitoring of a vehicle while on public streets by benefit of an attached GPS locator amounted to a search within the meaning of the Fourth Amendment. The majority concluded that the agency had conducted a search, and because the intrusion occurred in the absence of a valid warrant, it was a violation of Fourth Amendment prohibitions against unreasonable searches and seizures. In his concurrence, Justice Alito proposed that, as opposed to short-term monitoring, long-term GPS monitoring and cataloguing of a vehicle’s every movement impinged upon society’s expectation of privacy. *Id.* at ___, 181 L. Ed. 2d at 934 (Alito, J., concurrence). We note that as to the application of the Fourth Amendment in the context of SBM, our Court has declared *United States v. Jones* to be inapposite. See *State v. Jones*, ___ N.C. App. ___, ___, 750 S.E.2d 883, 886 (2013) (citing *State v. Martin*, ___ N.C. App. ___, 735 S.E.2d 238 (2012) (holding SBM is not a violation of the defendant’s Fourth Amendment right to be free from unreasonable searches and seizures)).

We also note that in *United States v. Jones*, the Court was analyzing an event that took place in the context of a law enforcement agency’s investigation of narcotics trafficking. The concerns articulated in Justice Alito’s concurrence are distinguishable from the circumstance for which defendant seeks our review: the continuous monitoring of a person who has been convicted and sentenced for an aggravated offense, as defined by section 14-208.6. See N.C. Gen. Stat. § 14-208.6(1a) (2013) (“‘Aggravated offense’ means any criminal offense that includes

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either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.”).

Defendant’s participation in an SBM program following his conviction for an aggravated offense – forcible rape – does not infringe upon any fundamental right. *See Jones*, ___ N.C. App. ___, 750 S.E.2d 883; *Martin*, ___ N.C. App. ___, 735 S.E.2d 238. Defendant’s asserted “fundamental right to be free from continuous government surveillance” is not one we have ever recognized in the context of SBM. On the contrary, “an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective and has been historically so regarded.” *State v. Bare*, 197 N.C. App. 461, 467, 677 S.E.2d 518, 524 (2009) (citation and quotations omitted). Therefore, defendant cannot establish that his participation in an SBM program infringes upon a fundamental right. We overrule this portion of defendant’s substantive due process argument.

However, defendant argues in the alternative that General Statutes section 14-208.40B(c) as applied to him violates substantive due process because it is not rationally related to its purpose of protecting the public from recidivism. Defendant contends that because section 14-208.40B(c) authorizes mandatory lifetime participation without consideration of defendant’s risk of reoffending, the statute is constitutionally unsound. We disagree.

“[U]nless legislation involves a suspect classification or impinges upon fundamental personal rights, it is presumed constitutional and need only be rationally related to a legitimate state interest.” *Huntington Prop., LLC v. Currituck Cnty.*, 153 N.C. App. 218, 229, 569 S.E.2d 695, 703 (2002) (citation and quotations omitted). “[T]he rational basis standard . . . ‘merely’ requires that a regulation bear some rational relationship to a conceivable legitimate interest of government.” *Bald Head Island, Ltd. v. Vill. of Bald Head Island*, 175 N.C. App. 543, 550, 624 S.E.2d 406, 410—11 (2006) (citation and quotations omitted).

Defendant cites *South Carolina v. Dykes*, 744 S.E.2d 505 (S.C. 2013), for the proposition that South Carolina’s SMB statute was deemed unconstitutional to the extent that it imposed upon the defendant lifetime SBM without (1) a determination of her dangerousness prior to being enrolled or (2) an opportunity for judicial review at a later date to address the necessity of her remaining enrolled in the program. The

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South Carolina Court held that “[i]n light of the [South Carolina] General Assembly’s stated purpose of protecting the public from sex offenders and aiding law enforcement, we find that the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test.” *Id.* at 510. However, “[t]he complete absence of any opportunity for judicial review to assess a risk of re-offending . . . is arbitrary and cannot be deemed rationally related to the legislature’s stated purpose of protecting the public from those with a high risk of re-offending.” *Id.* (citation omitted).

Because our North Carolina statutory scheme provides for both a determination of dangerousness prior to imposing enrollment in a satellite-based monitoring program *and* the possibility for review for later termination from satellite-based monitoring, any analysis of *Dykes*, 744 S.E.2d 505, is inapposite. We now look to relevant North Carolina General Statutes regarding satellite-based monitoring.

Pursuant to section 14-208.40B(c), when an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), the district attorney, representing the Division of Adult Correction, shall schedule a hearing in superior court.

[In this hearing,] the court shall determine if the offender falls into one of the categories described in G.S. 14-208.40(a). The court shall hold the hearing and make findings of fact pursuant to G.S. 14-208.40A.

If the court finds that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in satellite-based monitoring for life.

N.C. Gen. Stat. § 14-208.40B(c).

Defendant does not contest that his was a “reportable conviction” as defined by section 14-208.6(4). *See id.* § 14-208.6(4)(a.) (“‘Reportable conviction’ means: ‘A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting.’”). Defendant also does not challenge the trial court’s finding that his was an aggravated offense. *See id.* § 14-208.6(1a) (“‘Aggravated offense’ means any criminal offense that includes either of the following: (i) engaging in

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a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence”). Defendant’s argument is limited to a purported failure of the North Carolina SBM scheme, as applied here, to assess defendant’s risk of reoffending before imposing lifetime SBM and an inadequate process for petitioning to be removed from SBM.

In *State v. Bowditch*, our Supreme Court stated that “[t]he legislature’s intent in establishing SBM may be inferred from the declaration in the authorizing legislation that it ‘shall be known as “An Act To Protect North Carolina’s Children/Sex Offender Law Changes.”’ Ch. 247, sec. 1(a), 2006 N.C. Sess. Laws at 1066.” 364 N.C. 335, 342, 700 S.E.2d 1, 6 (2010). The Court reasoned that it was the intent of our legislature “to protect our State’s children from the recidivist tendencies of convicted sex offenders” *Id.*

Pursuant to section 14-208.40(a),

[t]he [SBM] program shall be designed to monitor . . . offenders as follows:

(1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.

N.C. Gen. Stat. § 14-208.40(a)(1) (2013).

It would appear that our General Assembly has determined that an offender convicted of a particular classification of crimes is to be subject to lifetime satellite-based monitoring. Implicit in this statutory scheme is a recognition of an offender’s risk of re-offending if he has committed a certain type of offense. This defendant, by statute, is subject to SBM for life. Further, the statutory scheme provides that if the court finds the offense committed is not an aggravated offense (along with other exceptions) *and* the offender is not a recidivist, the court shall conduct a risk assessment to determine whether and for what period of time a defendant should be subject to SBM. *See id.* § 14-208.40A(d),(e). Similar to the South Carolina policy to protect the public from sex offenders as stated by the *Dykes* Court, the North Carolina policy set forth in the SMB statutes is the same, and therefore, we believe the imposition of SBM to be rationally related to the purpose of protecting children and

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the more general public. *See K-Mart Corp.*, 358 N.C. at 180-81, 594 S.E.2d at 15 (“[T]he rational basis test or rational basis review applies, and this Court must inquire whether distinctions which are drawn by a challenged statute ... bear some rational relationship to a conceivable legitimate governmental interest. Rational basis review is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” (citation and quotations omitted)).

In further response to defendant’s argument that there is an inadequate process for petitioning to be removed from SBM, we note that our General Assembly has provided an avenue for petitioners seeking removal from SBM. Per General Statutes, section 14-208.43, “Request for termination of satellite-based monitoring requirement,”

[a]n offender described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(3) who is required to submit to satellite-based monitoring for the offender’s life *may file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission*. The request to terminate the satellite-based monitoring requirement and to terminate the accompanying requirement of unsupervised probation may not be submitted until at least one year after the offender: (i) has served his or her sentence for the offense for which the satellite-based monitoring requirement was imposed, and (ii) has also completed any period of probation, parole, or post-release supervision imposed as part of the sentence.

N.C. Gen. Stat. § 14-208.43(a) (2013). Again, we hold the imposition of SBM as applied to defendant is rationally related to the purpose of protecting children and the general public and does not impermissibly infringe upon defendant’s due process rights. Accordingly, defendant’s arguments are overruled.

Affirmed.

Judges HUNTER, Robert C., and STEELMAN concur.

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[235 N.C. App. 211 (2014)]

STATE OF NORTH CAROLINA

v.

OMARI JIBRI WILLIAMS

No. COA14-1

Filed 15 July 2014

1. Appeal and Error—preservation of issues—failure to move to dismiss

Defendant's argument in a felonious hit and run case that the State did not present sufficient evidence of the crime was dismissed. Defendant failed to move to dismiss the charge at the close of the State's evidence or at the close of all the evidence.

2. Constitutional Law—effective assistance of counsel—failure to move to dismiss—no prejudice

Defendant did not receive ineffective assistance of counsel in a felony hit and run case where his trial counsel did not move to dismiss the charge at either the close of the State's evidence or at the close of all the evidence. Defendant failed to show that there was a reasonable probability that, but for counsel's failure to make a motion to dismiss, the result of the proceeding would have been different where the trial court properly submitted the issue of whether defendant knew or should have known that his vehicle had struck a person.

Upon writ of *certiorari* from judgment entered 15 December 2011 by Judge Richard L. Doughton in Buncombe County Superior Court. Heard in the Court of Appeals 22 April 2014.

Roy Cooper, Attorney General, by Kevin G. Mahoney, Assistant Attorney General, for the State.

Craig M. Cooley for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to make a motion to dismiss at the close of all of the evidence, he waived the right to appeal that issue. Where there was substantial evidence presented that defendant should reasonably have known that the crash resulted in serious bodily injury to a person, it was for the jury to determine the weight and credibility of the evidence.

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Defendant failed to show prejudice arising from the failure of his counsel to make a motion to dismiss at the close of all of the evidence.

I. Factual and Procedural Background

On the evening of 28 January 2011, Omari Jibri Williams (defendant) had been drinking with friends at several bars in Asheville. Defendant drove home at 2 a.m., on Emma Road, an unlighted and curving road. He was driving a van belonging to a friend. Defendant struck something, and stopped the vehicle, but was unable to ascertain what the vehicle had struck. There was a hole in the windshield, the right front headlight was broken, the antenna bent, the right front signal light was broken, and the front of the vehicle was dented.

The vehicle had struck Richard Leroy McCoy (McCoy), who was walking on the edge of the road, hurling him forty feet to a point twelve feet off of the side of the road. McCoy was found at 8:30 a.m. on 29 January 2011 by a passerby. The investigation by the Highway Patrol found debris from the van. From a part number found on a piece of debris, investigators were able to identify the type of vehicle involved. A surveillance video from a nearby convenience store showed a white van with damage to the right front of the vehicle.

Defendant heard about the accident on the news on 30 January 2011. He contacted the Asheville Police Department, and turned himself in to the Highway Patrol. Defendant waived his *Miranda* rights, and gave statements that he knew he hit something, but did not know what it was at the time.

On 2 May 2011, defendant was indicted for felonious hit and run, and driving while license revoked. Defendant pled guilty to driving while license revoked, but not guilty to felonious hit and run. At trial, defendant stipulated that he had struck McCoy, but that it was an accident, and he lacked knowledge of who or what he had struck. Defense counsel did not move to dismiss the hit and run charge at the close of the State's evidence, nor at the close of all of the evidence.

The jury found defendant guilty of felonious hit and run. Defendant was sentenced to an active term of incarceration of 19-23 months, and ordered to pay \$20,348.46 in restitution.

On 1 May 2013 this Court granted defendant's petition for writ of *certiorari*.

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[235 N.C. App. 211 (2014)]

II. Motion to Dismiss

[1] In his first argument, defendant contends that the State did not present sufficient evidence of the crime of felonious hit and run. We dismiss this argument.

A. Standard of Review

“In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(a)(1).

B. Analysis

Defendant contends that the State did not present sufficient evidence of felonious hit and run. However, defendant did not move to dismiss that charge either at the close of the State’s evidence or at the close of all of the evidence. The question of the sufficiency of the State’s evidence is therefore not preserved for appellate review. This argument is dismissed.

III. Ineffective Assistance of Counsel

[2] In his second argument, defendant contends that he was denied effective assistance of counsel. We disagree.

A. Standard of Review

“When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel’s conduct fell below an objective standard of reasonableness.” *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985). In order to meet this burden,

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Campbell, 359 N.C. 644, 690, 617 S.E.2d 1, 29 (2005) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693

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(1984)). “Prejudice is established by showing that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Both prongs of this test must be met to prevail on an ineffective assistance of counsel claim.” *Id.* at 690, 617 S.E.2d at 29-30 (quotations and citations omitted).

B. Analysis

Defendant contends that trial counsel’s failure to make a motion to dismiss at the close of all of the evidence constituted ineffective assistance of counsel.

Defendant was indicted for a violation of N.C. Gen. Stat. § 20-166(a), which provides:

(a) The driver of any vehicle who knows or reasonably should know:

(1) That the vehicle which he or she is operating is involved in a crash; and

(2) That the crash has resulted in serious bodily injury, as defined in G.S. 14-32.4, or death to any person;

shall immediately stop his or her vehicle at the scene of the crash. The driver shall remain with the vehicle at the scene of the crash until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.

N.C. Gen. Stat. § 20-166(a) (2013).

We address defendant’s argument, under the second prong of the *Strickland* test, as to whether defendant has shown that there was a reasonable probability that, but for counsel’s failure to make a motion to dismiss, the result of the proceeding would have been different. We hold that defendant has failed to meet this burden.

Defendant’s argument on appeal is that he repeatedly stated that he did not know what the van struck. He further argues that his assertion was “objectively reasonable[.]” This restricts defendant’s argument as to the element of the charge pertaining to whether he knew or should reasonably have known that the vehicle was involved in a collision

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resulting in serious bodily injury to a person. Assuming *arguendo* that the issue of the sufficiency of the evidence had been preserved, our standard of review would be whether the State presented substantial evidence of defendant's knowledge of the fact that the crash resulted in serious bodily injury to a person. *See State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Such evidence can be either direct or circumstantial. *See State v. Miles*, ___ N.C. App. ___, ___, 730 S.E.2d 816, 822, *disc. review denied*, 366 N.C. 414, 734 S.E.2d 858 (2012) and *aff'd*, 366 N.C. 503, 750 S.E.2d 833 (2013). To withstand a motion to dismiss, the evidence, whether direct or circumstantial, must be "substantial;" that is, it must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In addition, in considering the evidence upon a defendant's motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State. *See State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). Where the defendant presents evidence, as was done in the instant case, "it is not to be considered by the trial court upon defendant's motion to dismiss unless favorable to the State." *State v. Beam*, 201 N.C. App. 643, 650, 688 S.E.2d 40, 45 (2010).

Applying these legal principles to all of the evidence presented, we conclude that there was sufficient evidence for this case to have been submitted to the jury. Whether defendant's assertion that he did not know that the van struck a person was "objectively reasonable" is not the correct standard of review. The State can establish the knowledge element of the offense of felonious hit and run by showing either that defendant actually knew, or that he reasonably should have known, that the vehicle which he was operating struck a person.

We hold that the analysis contained in the unpublished opinion of *State v. Wemyss*, ___ N.C. App. ___, 722 S.E.2d 14 (unpublished), *disc. review denied*, 366 N.C. 220, 726 S.E.2d 857 (2012), is persuasive on this point:

Aside from his misplaced reliance upon *Fearing*, Defendant's challenge to the sufficiency of the evidence to support his conviction rests upon the contention that (1) Defendant's own testimony concerning the events surrounding the accident, including his claim to have been unaware that he had hit or harmed Mr. Holder, coupled with the absence of certain specified items of physical evidence should have precluded a finding of guilt given the weakness of the circumstantial evidence presented by the

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State and (2) that Mr. Scott's challenge to the adequacy of the investigation into the collision conducted by the investigating officers completely undermined the State's case. However, as we have previously noted, the weight and credibility to be afforded to the testimony of particular witnesses is a matter for determination by the jury rather than a reviewing court. *State v. Moses*, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999), *cert. denied*, 528 U.S. 1124, 120 S.Ct. 951, 145 L.Ed.2d 826 (2000). For all of these reasons, we do not believe that Defendant's challenge to the sufficiency of the evidence to support his conviction has merit.

Id.

In the instant case, defendant knew that the van that he was operating struck something on Emma Road in the early morning hours of 29 January 2011. This impact caused substantial damage to the right front of the vehicle. Defendant had been drinking that night, was driving without a valid license, and had a prior driving while impaired conviction. Defendant failed to report the collision to law enforcement, and did not turn himself into law enforcement until he saw a report on the television news. McCoy was twelve feet off of the side of the road, where he was found later that morning.

We hold that the question of whether defendant should reasonably have known that he struck a person was properly submitted to the jury. It was for the jury to determine the weight and credibility of the evidence submitted by both the State and defendant.

Given this holding, defendant cannot show prejudice arising out of his counsel's failure to move for the dismissal of the charge at the conclusion of all of the evidence.

This argument is without merit.

DISMISSED IN PART, NO ERROR IN PART.

Judges HUNTER, Robert C., and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JULY 2014)

BOSTIAN v. MARIETTA No. 13-1016	N.C. Industrial Commission (657096)	Affirmed in part, reversed in part, and remanded in part
CEBULA v. GIVENS ESTATES, INC. No. 13-1316	Buncombe (12CVS373)	Affirmed
DEMAYO v. STONE BY LYNCH, LLC No. 14-119	Mecklenburg (12CVS19847)	Affirmed
GRAHAM v. DEUTSCHE BANK NAT'L TR. CO. No. 13-881	Guilford (12CVS4672)	Reversed and Remanded
HUNT v. LONG No. 13-1455	Columbus (12CVD1501)	Reversed and Remanded
IN RE FORECLOSURE OF CORNBUM No. 13-1247	Swain (09SP77-82) (10SP01) (10SP02) (10SP06)	Vacated
IN RE FORECLOSURE OF HARTY No. 13-1453	Union (12SP1003)	Affirmed
IN RE A.A. No. 14-291	Stokes (11JA27) (11JA28)	Vacated and Remanded
IN RE D.M.G. No. 14-96	Guilford (09JT511)	Affirmed
IN RE E.L.H. No. 14-209	Rutherford (11JT39-40)	Affirmed in part and remanded in part
IN RE L.F.G.K. No. 14-115	Cleveland (09JT128) (10JT125)	Dismissed in part, affirmed in part
IN RE L.G.O. No. 13-1454	Martin (12JA62-63)	Affirmed

IN RE L.L. No. 14-365	Orange (11JA1)	Affirmed
IN RE M.A.G. No. 14-195	Davidson (12JT134)	Affirmed
IN RE O.O. No. 14-106	Mecklenburg (13JA123)	Affirmed; remanded for a correction of a clerical error.
IN RE S.H. No. 14-196	Mecklenburg (09JT304) (10JT449) (12JT647)	Affirmed
KING v. BRYANT No. 13-1003	Cumberland (11CVS8280)	Affirmed
MEDURI v. MEDURI No. 14-107	Buncombe (11CVD1038)	Reversed and Remanded
OSBORNE v. TOWN OF NAGS HEAD No. 13-1123	Dare (12CVS402)	Affirmed
STATE v. ANDERSON No. 14-25	Caldwell (08CRS51489-90)	No Error
STATE v. BOYKIN No. 13-1367	Sampson (10CRS50722)	No Error
STATE v. BROWN No. 13-1265	Cabarrus (11CRS53301) (11CRS709808)	No Error
STATE v. CARROLL No. 14-14	Randolph (10CRS50590-93)	No Prejudicial Error
STATE v. CORBETT No. 13-1398	Johnston (12CRS51009-10)	No Error
STATE v. CRITE No. 14-61	Guilford (10CRS94650) (12CRS84462) (12CRS84464) (12CRS84466) (12CRS84467-69) (12CRS87109-10) (12CRS92372) (13CRS72224)	Affirmed

STATE v. FIGGS No. 14-294	Beaufort (11CRS52674)	No Error
STATE v. HOCUTT No. 14-76	Johnston (03CRS54060)	Affirmed
STATE v. JACOBS No. 14-306	Sampson (07CRS51724)	No Error
STATE v. JAMES No. 14-36	Forsyth (09CRS61925)	Dismissed
STATE v. MASSEY No. 14-27	New Hanover (13CRS5736)	Affirmed
STATE v. McCULLOCH No. 13-472	Wilkes (11CRS1078-1084) (11CRS50057-61) (11CRS50065-67) (11CRS50499-500) (11CRS50501-06)	Affirmed
STATE v. MORROW No. 13-1282	Haywood (10CRS53914) (10CRS53922)	No Error
STATE v. NELSON No. 13-1355	Mecklenburg (10CRS256238)	Affirmed
STATE v. PEARCE No. 13-1359	Mecklenburg (11CRS256463) (12CRS12725)	No Error
STATE v. RICHARDSON No. 13-1331	Wake (13CRS184) (13CRS200086-87)	No Error
STATE v. SLOAN No. 13-1469	Union (10CRS53476-77)	No Error
STATE v. SOUDEN No. 13-1151	Wake (12CRS219919)	No Error
STATE v. SPINKS No. 13-1150	Randolph (11CRS109)	No Error
STATE v. TAYLOR No. 13-1391	Hoke (08CRS52552)	Affirmed
STATE v. THORPE No. 14-37	Mecklenburg (10CRS233832)	Affirmed

STATE v. ROBINSON No. 13-1436	Forsyth (12CRS50342) (12CRS50343)	Affirmed
STEWART v. STEWART No. 14-168	Buncombe (09CVD3134)	Affirmed
TURNER v. AYERS No. 13-1057	Wake (12CVD12054)	Affirmed
WHEELESS v. MARIA PARHAM MED. CTR., INC. No. 13-1475	Vance (11CVS859)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 29 JULY 2014)

JACOKES v. APM BUILDERS, INC. No. 13-1329	Pender (11CVS1081)	Affirmed
STATE v. ATKINS No. 13-1242	Mecklenburg (11CRS210032) (11CRS210034-35)	No Error
STATE v. MEAD No. 14-3	Ashe (12CRS51013)	No Error
STATE v. PARKER No. 13-1381	Durham (11CRS51676)	No Error
STATE v. WALKER No. 13-1356	Wake (12CRS208506)	No Error

CARMICHAEL v. LIVELY

[235 N.C. App. 222 (2014)]

CHARLES R. CARMICHAEL, PETITIONER

v.

DAVID LIVELY, RESPONDENT

No. COA13-1429

Filed 5 August 2014

1. Appeal and Error—preservation of issues—failure to raise issue

Although respondent argued that the trial court erred by failing to make a finding about Katherine Carmichael's capacity in a case regarding her renunciation of her interest in real property, this issue was not preserved. Respondent's motion for summary judgment, as well as respondent's response to the petition for partition, failed to raise the issue of her lack of capacity.

2. Deeds—renunciation of real property—effective when filed with register of deeds

The trial court did not err by concluding that the renunciation of real property dated June 11, 2004, and filed with the clerk of court on 4 November 2004 did not take effect until filed with the register of deeds on 15 June 2006.

3. Deeds—rescission of renunciation—revocation

The trial court did not err by concluding that the rescission of renunciation executed by Katherine Carmichael on 28 December 2004 and filed with the clerk of court and register of deeds on 29 December 2004 rescinded and revoked the 11 June 2004 renunciation as to the real property owned by the decedent.

4. Deeds—quitclaim deed—renunciation filed subsequently had no effect

The trial court did not err by concluding that as of the date of the quitclaim deed, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property. Because a copy of the renunciation was not filed with the register of deeds until 15 June 2006, subsequent to the filing of the quitclaim deed, it had no effect on the interests of petitioner and Katherine Carmichael in the Townes Road Property.

Appeal by respondent from order entered 25 July 2013 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2014.

CARMICHAEL v. LIVELY

[235 N.C. App. 222 (2014)]

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin and Alexander W. Warner, for respondent-appellant.

Winfred R. Ervin, Jr. for petitioner-appellee.

McCULLOUGH, Judge.

Respondent David Lively appeals from an award of summary judgment in favor of petitioner Charles R. Carmichael. After careful and thoughtful review, we affirm the order of the trial court.

I. Background

The evidence in the record indicates that on 28 May 2004, Edna Frank Ward Lively's ("Edna Lively") Last Will and Testament was probated in Mecklenburg County Superior Court. Edna Lively's Last Will and Testament devised her home, located at 1446 Townes Road, Charlotte, North Carolina ("Townes Road Property") equally to her daughter Katherine Carmichael and her step-grandson, respondent David L. Lively, "if they survive me." On 4 March 2004, Edna Lively died. Both Katherine Carmichael and respondent survived Edna Lively.

On 11 June 2004, Katherine Carmichael signed a "Notice of Renunciation and Qualified Disclaimer" ("Renunciation") stating that she was "renouncing her interest in the [Townes Road Property]." On 4 November 2004, the Renunciation was filed in the Office of the Clerk of Mecklenburg County Superior Court.

On 24 November 2004, respondent filed an Executor Deed in the Mecklenburg County Register of Deeds. The Executor Deed provided that respondent was the sole beneficiary of the Townes Road Property "because Katherine G. Carmichael executed and filed a qualified disclaimer and renunciation[.]" It also provided that respondent, serving as executor of the estate of Edna Lively, "does grant, bargain, sell and release to" respondent, in his individual capacity, the Townes Road Property "TO HAVE AND TO HOLD all in singular, the aforesaid undivided interest[.]"

On 28 December 2004, Katherine Carmichael signed a "Notice of Revocation/Rescission of Notice of Renunciation and Qualified Disclaimer." ("Rescission") In the Rescission, Katherine Carmichael stated the following:

3. The undersigned . . . has been suffering from significant health problems for several years that have been

CARMICHAEL v. LIVELY

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the subject of medical evaluation and diagnosis. Due to those problems, the undersigned has for approximately the past two years been unable to handle her affairs without assistance. For approximately the past two years, the undersigned has attended to her financial affairs and other personal matters with substantial assistance from her husband, [petitioner] Charles Carmichael.

4. Due to the undersigned's medical problems she felt unable to assume the role of Executrix of [Edna Lively's estate], and for that reason renounced her right to serve as Executrix of the Estate on April 27, 2004 and did so with [petitioner]'s assistance.
5. In late May of 2004 [respondent], Executor of the [Edna Lively estate] told the undersigned that she needed to appear at an attorney's office to meet with him and the Estate attorney to sign some papers concerning this Estate. On or about June 8, 2004, [petitioner] drove the undersigned to the law office of Elizabeth Blake, an attorney then representing [respondent]. Ms. Blake at that time did not represent the undersigned, nor did the undersigned consult with or retain the services of counsel concerning the document(s) presented to her in Ms. Blake's office.
6. On or about June 8, 2004 (in the law offices of Ms. Blake) the undersigned was presented an unsigned copy of the [Renunciation] . . . to sign, and she did so. The undersigned did meet in private with Ms. Blake for some period of time before she left Ms. Blake's law office, but cannot now recall what was discussed. In fact the undersigned does remember that she signed a document in Ms. Blake's office, but does not independently recall the terms or nature of that document and only now remembers the document signing and some of those surrounding circumstances after having been provided a copy of [the Renunciation] that was filed with the Clerk of Superior Court in November of 2004.
7. After now reading [the Renunciation], the undersigned now realizes (because she has now been advised as to the nature of the document) that the

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effect of that document, if valid and subsisting, is to divest the undersigned of any interest in [Edna Lively's estate]. The undersigned does not now, nor has she ever intended that to occur, contrary to the wishes of [Edna Lively].

....

10. The undersigned hereby confirms her interest in the [Townes Road Property].

The Rescission was filed in the Register of Deeds on 29 December 2004.

Also on 29 December 2004, Katherine Carmichael filed a Quitclaim Deed with the Register of Deeds ("Quitclaim Deed"), wherein she conveyed her interest in the Townes Road Property to herself and petitioner as tenants by the entireties.

Subsequently, on 15 June 2006, a copy of the Renunciation was filed in the Mecklenburg County Register of Deeds. Katherine Carmichael died on 11 March 2009.

On 23 November 2009, petitioner filed a "Petition (To Partition Real Property)" against respondent. The petition alleged that petitioner and respondent each owned a one-half undivided interest in the Townes Road Property. It also provided the following, in pertinent part:

8. The Towne[s] Road Property is a single residential subdivision lot upon which is situated a detached single family residence[.] . . . [T]he current single family residential usage of the Towne[s] Road Property is its highest and best allowable use.
9. An actual partition of the Towne[s] Road Property . . . would result in rendering the respective interest(s) of each of the parties in said property to be of substantially less monetary value than their respective monetary interests resulting from a Partition Sale of that property as sought by Petitioner herein; an actual partition of the Towne[s] Road Property cannot be made without injury to all of the parties interested (the Petitioner and the Respondent).

As such, petitioner argued that it was entitled to an order of sale of the Townes Road Property pursuant to Article II of Chapter 46 of the North Carolina General Statutes.

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On 6 January 2010, respondent filed a “Response to Petition to Partition Real Property” denying that petitioner and respondent owned the Townes Road Property as tenants-in-common and asserting that respondent was the sole owner of the Townes Road Property. Respondent argued that he was the sole owner pursuant to the Renunciation and the Executor Deed. Respondent requested that the court dismiss with prejudice the petition to partition real property or, in the alternative, transfer the matter to Mecklenburg County Superior Court.

On 20 April 2011, respondent filed a “Memorandum and Motions to Dismiss, Motion In Limine, and/or Motion for Summary Judgment.” Following a hearing held on 10 May 2011, the trial court entered an order on 29 August 2011 denying respondent’s motion to dismiss. The trial court also transferred the special proceeding to Mecklenburg Superior Court for the determination of the following issue:

As of the recording of Katherine Carmichael’s [Quitclaim Deed] dated December 29 2004 (and recorded in MCPR book 18183, at page 559) did Katherine Carmichael and [petitioner] own a ½ undivided interest in the real property that was the subject of that deed, or did the renunciation document effectively divest Katherine Carmichael of any interest in said real property?

On 22 July 2013, petitioner filed a motion for summary judgment. The trial court held a hearing at the 22 July 2013 term of Mecklenburg County Superior Court, for the determination of respondent’s motion to dismiss and cross motions for summary judgment. On 25 July 2013 the trial court entered an order, making the following findings of fact:

1. Edna Frank Ward Lively died testate on March 4, 2004.
2. At the time of her death, Decedent owned [the Townes Road Property].
3. Decedent by will signed January 22, 1992 devised her residence to [Katherine Carmichael and respondent].
4. Katherine Carmichael signed a notice of renunciation of her interest in said real property by document signed June 11, 2004 which was recorded in the office of the Clerk of Court of Mecklenburg County on November 4, 2004.
5. Katherine Carmichael filed a rescission of said renunciation by document filed with the Clerk of Court on

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December 28, 2004 and recorded in the Register of Deeds on December 29, 2004.

6. Katherine Carmichael executed a quitclaim deed December 29, 2004 to [petitioner] in said real property, said deed being recorded December 29, 2004 in the office of the Register of Deeds.
7. The renunciation dated June 11, 2004 was recorded in the office of the Register of Deeds June 15, 2006.
8. N.C.G.S. 31B-2(c) in 2004 provided in part, “The renunciation shall be filed with the clerk of court of the county in which the proceedings have been commenced. . . .”
9. N.C.G.S. 31B-2(d) in 2004 provided in part, “If real property or an interest therein is renounced, a copy of the renunciation shall also be filed for recording in the office of the register of deeds of all counties wherein any part of the . . . interest renounced is situated. . . . The renunciation of an interest, or a part thereof, in real property shall not be effective to renounce such interest until a copy of the renunciation is filed for recording in the office of the register of deeds. . . .”

The trial court then concluded that

1. The renunciation dated June 11, 2004, and filed with the Clerk of Court November 4, 2004 did not take effect until filed with the Register of Deeds on June 15, 2006.
2. The rescission of renunciation executed by Katherine Carmichael on December 28, 2004 and filed with the Clerk of Court and Register of Deeds on December 29, 2004 rescinded and revoked the June 11, 2004 renunciation as to the real property owned by the decedent.

Based on the foregoing, the trial court effectively granted petitioner’s motion for summary judgment and held that as of the recording of Katherine Carmichael’s 29 December 2004 quitclaim deed, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property.

From the 25 July 2013 order, respondent appeals.

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II. Standard of Review

The standard of review for an order granting summary judgment is *de novo*. *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 87, 747 S.E.2d 220, 225-26 (2013). Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). “In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party.” *Vulcan Materials Co. v. Iredell Cnty.*, 103 N.C. App. 779, 781, 407 S.E.2d 283, 285 (1991) (citation omitted).

III. Discussion

On appeal, respondent argues that the trial court erred by effectively granting petitioner’s motion for summary judgment. Respondent argues that the trial court erred by: (A) failing to enter any findings of fact regarding Katherine Carmichael’s capacity at the time she was signing the documents at issue; (B) concluding that the Renunciation did not take effect until it was filed with the Register of Deeds; (C) concluding that the Rescission rescinded and revoked the Renunciation; and (D) concluding that as of the recording of the Quitclaim Deed, petitioner and Katherine Carmichael owned a one-half undivided interest in the Townes Road Property.

A. Katherine Carmichael’s Capacity

[1] First, respondent argues that the trial court erred by failing to enter a finding of fact regarding Katherine Carmichael’s capacity in 2004 to execute various relevant documents.

“We note that ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal.” *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991). “However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment.” *Vulcan Materials Co.*, 103 N.C. App. at 781, 407 S.E.2d at 285 (citation omitted).

In the case *sub judice*, the trial court entered nine findings of fact and two conclusions of law. Although the trial court did not enter any findings of fact regarding Katherine Carmichael’s capacity to execute documents in 2004, we do not believe that the trial court was required to

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do so because this issue was not properly before the court. The only issue before the trial court at the summary judgment hearing was whether as of the recording of the Quitclaim Deed on 29 December 2004, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property or whether the Renunciation effectively divested Katherine Carmichael of any interest in the Townes Road Property.

At the beginning of the summary judgment hearing, respondent's counsel conceded that "[t]he only issue is whether or not the Petitioner owns an interest in the real estate, Judge. They have raised [the capacity] issue in the past; that has been addressed, but it's not before – [the capacity issue is] not properly before the Court." *See Byrd v. Hancock*, 86 N.C. App. 564, 568, 358 S.E.2d 557, 559 (1987) (where the defendant's "forecast of proof [at the summary judgment hearing] did not call into question" the defendant's argument on appeal, the "plaintiff was not obliged to make any showing whatever with respect to these matters" and the argument was irrelevant to the issues raised at the hearing). Furthermore, respondent's motion for summary judgment, as well as respondent's response to the petition for partition, fails to raise the issue of Katherine Carmichael's lack of capacity. *See* N.C. R. App. P. 10(a)(1) (2014) (stating that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"). Based on the foregoing reasons, we reject respondent's argument that the trial court erred by failing to make a finding about Katherine Carmichael's capacity.

B. The Renunciation

[2] In his next argument, respondent asserts that the trial court erred by making the following conclusion:

1. The renunciation dated June 11, 2004, and filed with the Clerk of Court November 4, 2004 did not take effect until filed with the Register of Deeds on June 15, 2006.

As previously stated, we re-emphasize that the trial court was not required to enter *any* conclusions of law in its summary judgment order and generally, they are disregarded on appeal. *See Sunamerica Financial Corp.*, 328 N.C. at 261, 400 S.E.2d at 440. However, we find that the challenged conclusion of law sheds light on our review of the trial court's reasoning to render summary judgment for petitioner.

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Specifically, respondent argues that the statutory method of renunciation outlined in Chapter 31B of the North Carolina General Statutes is not an exclusive method of accomplishing a renunciation. Respondent also contends that in light of the “very specific timing requirements for a renunciation filing under § 31B-2(a)¹ and § 31B-2(b)², . . . it would appear that the General Assembly did not intend for there to be a similar requirement” applicable to N.C. Gen. Stat. § 31B-2(d) (2004).

“[W]hen construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction.” *In re Estate of Mangum*, 212 N.C. App. 211, 213, 713 S.E.2d 18, 20 (2011) (citation omitted). “However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.” *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (citation omitted).

Chapter 31B of the North Carolina General Statutes is entitled “Renunciation of Property and Renunciation of Fiduciary Powers Act.” Section 31B-2 (2004), in effect at the time the Renunciation was executed, was entitled, “Time and place of filing renunciation.” The 25 July 2013 order directed our attention to N.C. Gen. Stat. § 31B-2, subsections (c) and (d), in its findings of fact. Subsection (c) of section 31B-2 stated that “[t]he renunciation shall be filed with the clerk of court of the county in which proceedings have been commenced for the administration of the estate of the deceased owner[.]” N.C.G.S. § 31B-2(c) (2004). Subsection (d) of section 31B-2 provided, as follows:

(d) If real property or an interest therein is renounced, a copy of the renunciation shall also be filed for recording in the office of the register of deeds of all counties wherein

1. N.C. Gen. Stat. § 31B-2(a) (2004) provided that “[t]o be a qualified disclaimer for federal and State inheritance, estate, and gift tax purposes, an instrument renouncing a present interest shall be filed *within the time period* required under the applicable federal statute for a renunciation to be given effect as a disclaimer for federal estate and gift tax purposes. If there is no such federal statute the instrument shall be filed not later than *nine months* after the date the transfer of the renounced interest to the renouncer was complete for the purpose of such taxes.” N.C.G.S. § 31B-2(a) (2004) (emphasis added).

2. N.C. Gen. Stat. § 31B-2(b) (2004) provided that “[a]n instrument renouncing a future interest shall be filed not later than *six months* after the event by which the taker of the property or interest is finally ascertained and his interest indefeasibly vested and he is entitled to possession even though such renunciation may not be recognized as a disclaimer for federal estate tax purposes.” N.C.G.S. § 31B-2(b) (2004) (emphasis added).

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any part of the interest renounced is situated. . . . The renunciation of an interest, or a part thereof, in real property *shall not be effective to renounce such interest until a copy of the renunciation is filed for recording in the office of the register of deeds in the county wherein such interest or part thereof is situated.*

N.C. Gen. Stat. § 31B-2(d) (2004) (emphasis added).

An examination of N.C. Gen. Stat. § 31B-2(d) reveals that the language used by the General Assembly is clear and unambiguous. The mandatory language of subsection 31B-2(d) demonstrates that the legislature intended that a renunciation of an interest in real property *shall not be effective* until a copy of the renunciation is filed in the office of the register of deeds in the county where such interest is situated. “As used in statutes, the word ‘shall’ is generally imperative or mandatory.” *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (citation omitted).

Giving effect to the plain meaning of the words used, we are compelled to agree with the trial court that although the Renunciation was dated 11 June 2004 and filed with the Clerk of Court on 4 November 2004, it was not effective to renounce Katherine Carmichael’s interest in the Townes Road Property until a copy of the Renunciation was filed in the Register of Deeds. Because a copy of the Renunciation was not filed with the Mecklenburg County Register of Deeds until 15 June 2006, an undisputed fact, the language used in subsection 31B-2(d) mandates that the Renunciation would not have taken effect until 15 June 2006. Accordingly, we hold that the trial court did not err by making this conclusion and find respondent’s arguments unpersuasive.

C. The Rescission

[3] Next, respondent argues that the trial court erred by concluding the following:

2. The rescission of renunciation executed by Katherine Carmichael on December 28, 2004 and filed with the Clerk of Court and Register of Deeds on December 29, 2004 rescinded and revoked the June 11, 2004 renunciation as to the real property owned by the decedent.

Respondent first argues that the Rescission was ineffective because the Renunciation was irrevocable based on the following language contained within the Renunciation: “WHEREFORE, the undersigned does hereby completely, irrevocably and without qualification renounce and

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disclaim his rights in the [Townes Road Property[.]]” Respondent then asserts that the Executor Deed effectively transferred the Townes Road Property to respondent, making him the sole owner, prior to the filing of the Quitclaim Deed.

It is important to note that the merit of both of respondent’s arguments rests on the assumption that the Renunciation was in effect prior to the 24 November 2004 Executor Deed and the 29 December 2004 Rescission. Because we have previously held that the Renunciation would not have been effective in renouncing Katherine Carmichael’s interest in the Townes Road Property until it was filed in the Register of Deeds on 15 June 2006, respondent’s arguments necessarily fail.

D. Quitclaim Deed

[4] In his last argument, respondent contends that the trial court erred by concluding that as of the date of the Quitclaim Deed, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property.

The record establishes that the Quitclaim Deed, filed in the Mecklenburg County Register of Deeds on 29 December 2004, conveyed Katherine Carmichael’s one-half undivided interest devised to her by Edna Lively’s Last Will and Testament in the Townes Road Property, to Katherine Carmichael and petitioner as tenants by the entireties. Because a copy of the Renunciation was not filed with the Register of Deeds until 15 June 2006, subsequent to the filing of the Quitclaim Deed, it had no effect on the interests of petitioner and Katherine Carmichael in the Townes Road Property. Therefore, we reject respondent’s argument that the trial court erred by reaching this conclusion and entering summary judgment in favor of petitioner.

IV. Conclusion

For the reasons discussed above, we affirm the 25 July 2013 order of the trial court, granting summary judgment in favor of petitioner.

Affirmed.

Judges ELMORE and DAVIS concur.

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[235 N.C. App. 233 (2014)]

JOSEPH FAZZARI, ET AL., PLAINTIFFS
v.
INFINITY PARTNERS, LLC, ET AL., DEFENDANTS

No. COA13-1303

Filed 5 August 2014

1. Mortgages and Deeds of Trust—inflated appraisals—action against lenders—summary judgment for lenders

The trial court did not err by granting summary judgment for the lenders on claims arising from a failed land development plan that involved inflated appraisals where those claims were based in common law negligence and the Mortgage Lending Act (MLA). In North Carolina, there is no cause of action for negligent underwriting of loans for the purchase of real estate; even if there were, plaintiffs could not show justified reliance because they forecast no evidence that they made independent inquiries into the values of the lots or were prevented from doing so. The MLA did not apply because the loans were to finance the purchase of lots as investments and not for residential use.

2. Unfair Trade Practices—summary judgment—failure to show misrepresentations or reliance

The trial court properly granted summary judgment on unfair and deceptive trade practice (UDTP) claims against certain of the plaintiffs (the Fifth Third Bank plaintiffs) in an action arising from a failed real estate development and inflated appraisals. The Fifth Third plaintiffs were not able to show either misrepresentations or reliance on the allegedly negligent appraisals.

Appeals by Plaintiffs¹ from orders entered 8 and 22 March 2012 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 May 2014.

Ellis & Parker PLLC,² by L. Neal Ellis, Jr., and Nathaniel Parker, for Plaintiffs.

1. The specific plaintiffs appealing from each order are identified in our discussion of the procedural history of this case.

2. Plaintiffs' brief styles their appellate counsel as "Ellis & Anthony" while their reply brief lists "Ellis & Parker, PLLC[.]" Both briefs name the same two individual attorneys.

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McGuireWoods LLP, by H. Landis Wade, Jr., and Steven N. Baker, for Defendant Fifth Third Bank.

Robinson Bradshaw & Hinson, P.A., by Douglas M. Jarrell and Ty E. Shaffer, for Defendant Wachovia Bank, N.A., now known as Wells Fargo Bank, N.A.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal arises from the 2007 failure of Grandfather Vistas, a real estate development located in Caldwell County. In 2006, approximately 1,000 acres of land in Caldwell County was purchased for \$10.9 million, which Defendants Infinity Partners, LLC; Infinity Real Estate Partners, LLC; Source One Communities LLC; Prudential Source One, LLC; and Peerless Real Estate Services, Inc.,³ planned to develop. The purchase was financed through a “land banking” program in which the developers sold approximately sixty ten-acre lots for \$500,000 each (“the founders’ lots”), with “buyback” contracts that guaranteed the developers would repurchase each lot for \$625,000 within one year. The purchase contracts for the founders’ lots also included provisions for the developers to pay the purchasers’ interest from closing until the repurchase. The purchase contracts stated that purchasers would obtain fixed rate financing on a thirty-year term at an initial interest rate not to exceed 7.5% per annum with a loan-to-value ratio of at least 90%.⁴ Following repurchase of the founders’ lots, the developers planned to subdivide the lots into one-acre retail parcels for resale. Defendant Blue River Ridge at Blowing Rock, LLC was formed by Peerless and Source One to purchase, own, and develop Grandfather Vistas and to eventually buy back the founders’ lots.

The developers used a real estate company to market the founders’ lots, and the real estate company, in turn, created a marketing plan that relied on preferred lender arrangements with First Charter Bank

3. The defendants noted here are referred to collectively as “the developers.”

4. However, as discussed herein, no Plaintiff obtained a loan on these terms. Rather, all of their loans for purchase of the founders’ lots were of much shorter terms, many for as little as two years.

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of North Carolina;⁵ Wachovia Bank, N.A.;⁶ and SunTrust Banks, Inc.⁷ (collectively, “the lenders”). Beginning in May 2006, the developers began selling founders’ lots, and Plaintiffs were among the purchasers. SunTrust and Fifth Third used Defendant A. Greg Anderson, d/b/a Anderson & Associates, (“Anderson”) exclusively to perform appraisals of the founders’ lots in connection with those sales. Wells Fargo did not employ Anderson for any appraisals at issue in this appeal, using several other appraisers instead (“the Wells Fargo appraisers”). Anderson and the Wells Fargo appraisers valued every founder’s lot at \$500,000, regardless of the lot’s specific qualities or location in Grandfather Vistas. That value was the exact minimum amount needed in order to meet the loan-to-value provision of the purchase contracts. The actual value of the lots ranged from \$40,000 to \$81,000.⁸

Little of the money raised through sales of the founders’ lots was invested in Grandfather Vistas, and by 2007, all development activity had ceased. None of the founders’ lots were ever repurchased from Plaintiffs. As a result, on 16 December 2008, Plaintiffs initiated a lawsuit in file number 08 CVS 27336 against various defendants, including, *inter alia*, the developers, the lenders, and Anderson. Plaintiffs’ complaint included claims against the lenders for fraud, fraud in the inducement, negligence, negligent misrepresentation, conversion, civil conspiracy, and unfair and deceptive trade practices (“UDTP”) pursuant to Chapter

5. First Charter Bank was acquired by Fifth Third Bank, N.A., which, following a merger on 30 September 2009, became known as Fifth Third Bank. Throughout this opinion, unless otherwise specified, defendants Brian Kiser and Jeff Collins, former loan officers with what was then First Charter Bank, are included in all references to “Fifth Third” or “the lenders.”

6. Wachovia Bank, N.A., was a subsidiary of Wachovia Corporation. On 31 December 2008, Wachovia Corporation merged with Wells Fargo & Company. We refer to this defendant hereafter as “Wells Fargo.”

7. The proper party was actually SunTrust Mortgage, Inc., a wholly owned subsidiary of SunTrust Banks, Inc.

8. Anderson was later suspended by the North Carolina Appraisal Board because of his involvement in another land development scheme gone awry which likewise resulted in lawsuits and subsequent appeals to this Court. This Court affirmed summary judgment for Anderson and another appraiser in that matter. See *Williams v. United Cmty. Bank*, __ N.C. App. __, 724 S.E.2d 543 (2012). Fifth Third, Peerless, and several of the individual developer defendants were also involved in that land development/investment scheme. In an opinion filed 6 December 2011, this Court affirmed summary judgment in favor of Fifth Third against the *Williams* plaintiffs on, *inter alia*, Chapter 75 claims. See *In re Fifth Third Bank, N.A.*, 217 N.C. App. 199, 719 S.E.2d 171 (2011), *cert. denied*, 366 N.C. 231, 731 S.E.2d 687 (2012).

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75 of our General Statutes.⁹ Claims brought against Anderson included fraud, fraud in the inducement, negligence, negligent misrepresentation, conversion, civil conspiracy, and UDTF.¹⁰ The lenders filed answers in February and March 2009, asserting various defenses and counterclaims, including default by Plaintiffs on promissory notes securing their loans.¹¹

On 15 July 2011, Anderson moved for summary judgment on all remaining claims against him,¹² asserting, *inter alia*, that Plaintiffs could not show reliance on any of his alleged misrepresentations. On the same date, the lenders filed motions for summary judgment as to all remaining claims against them,¹³ on their counterclaims against Plaintiffs, and for attorneys' fees. On 16 February 2012, the court¹⁴ entered summary judgment in favor of Anderson on all claims against him ("the Anderson summary judgment order"). On 8 March 2012, the trial court entered an order which (1) granted the lenders' motions for summary judgment, (2) dismissed with prejudice all remaining claims against the lenders, (3) denied Plaintiffs' motion to amend their complaint to add UDTF claims against Wells Fargo and SunTrust,¹⁵ and (4) taxed costs against

9. Plaintiffs did not bring claims for fraud, fraud in the inducement, or UDTF against Wells Fargo or SunTrust Bank.

10. On 19 May 2009, the Chief Justice designated the case in file number 08 CVS 27336 and a related case in file number 09 CVS 6239 as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. The Honorable Timothy L. Patti, resident Superior Court Judge in Gaston County, was designated to preside over the cases. The case in 09 CVS 6239 appears to involve a lawsuit by two additional purchasers of founders' lots against Anderson, the lenders, the developers and others involved in the investment scheme.

11. By order entered 27 July 2009, Plaintiffs were permitted to file an amended complaint, and the lenders filed amended responsive pleadings thereafter.

12. From our review of the extraordinarily extensive record in these appeals, it appears that some of the original plaintiffs settled or withdrew their claims, or otherwise dropped out of the case before the lenders and Anderson filed their motions for summary judgment.

13. In the motions, Wells Fargo listed Plaintiffs' remaining claims against it as negligence, negligent misrepresentation, conversion, and civil conspiracy.

14. As noted *supra*, the Chief Justice designated Judge Patti to preside over the matter. Judge Patti signed orders entered in the matter through September 2010. Following Judge Patti's retirement, the Honorable W. Erwin Spainhour presided over the matter and signed all orders entered by the court from July 2011 on, including the lenders' summary judgment order and Anderson's summary judgment order.

15. See footnote 9, *supra*.

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Plaintiffs (“the lenders’ summary judgment order”). On the same day, the court entered judgments in favor of the lenders on their counterclaims against Plaintiffs Joseph Fazzari (Fifth Third); Danuta K. McIvor (Fifth Third); Scott W. McQuay (Fifth Third); Charles H. Owens (Fifth Third); William Decker (Fifth Third); Carol H. Harris (Wells Fargo); Roscoe E. Harris (Wells Fargo); Renee C. Miller, as Trustee of Renee C. Miller Living Trust (Wells Fargo); Darryl Strack (Wells Fargo); Kathryn M. Strack (Wells Fargo); Christa S. Tighe (Wells Fargo); and James K. Tighe, Jr. (Wells Fargo). On 19 March 2012, the court entered an order allowing Anderson’s verified bill of costs. On 22 March 2012, the court entered orders allowing the lenders’ verified bills of costs.

In June 2013, Plaintiffs filed a motion for default judgment against Defendants Kevin J. Foster, Neil O’Rourke, and Anthony Porter. Orders of default had previously been entered against these defendants, who had key roles in managing Peerless, one of the Grandfather Vistas development entities. The motion also sought voluntary dismissals with prejudice of the remaining claims against Defendants P. Marion Rothrock; Rothrock Engineering; Blue River Ridge at Blowing Rock, LLC; Grandfather Vistas, LLC; Infinity Partners, LLC; and Infinity Real Estate Partners, LLC. On 10 July 2013, the trial court entered a final order in the matter which (1) granted Plaintiffs’ motion for default judgment jointly and severally against Foster, O’Rourke, and Porter in the amount of \$22,588,156.07, and (2) granted Plaintiffs’ motion to voluntarily dismiss with prejudice and without costs the other remaining defendants.

On 8 August 2013, Plaintiffs Joseph Fazzari; K. Scott Fischer; Thomas L. Barnhardt; Kimberly Barnhardt; Windspirit Properties, LLC; William Decker; Douglas M. Ellis; Kelly Ellis; Lynn Falero; Ralph Falero; Kenneth Fischer; Carol H. Harris; Roscoe E. Harris; Scott W. McQuay; Renee C. Miller, as Trustee of Renee C. Miller Living Trust; Charles H. Owens; Danuta K. McIvor; Darryl Strack; and James K. Tighe, Jr., gave notice of appeal from the 8 March 2012 lenders’ summary judgment order and the 22 March 2012 lenders’ cost orders.¹⁶ On the same date, Plaintiffs Joseph Fazzari; Danuta K. McIvor; Scott W. McQuay; Charles H. Owens; William B. Decker; Carol H. Harris; Roscoe E. Harris; Renee C. Miller; Darryl J. Strack; Kathryn M. Strack;¹⁷ Christa S. Tighe; and James K. Tighe, Jr.,

16. On 5 March 2014, Plaintiffs’ counsel notified this Court that K. Scott Fischer and Kenneth Fischer, the only remaining appellants as to SunTrust, had reached a final settlement of all matters at issue in this appeal, and moved to dismiss SunTrust from the appeal. That motion was allowed by order of this Court entered 7 March 2014. Accordingly, in the discussion section of this opinion, “the lenders” refers only to Wells Fargo and Fifth Third.

17. Kathryn M. Strack withdrew her notice of appeal on 26 September 2013.

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gave notice of appeal from the 8 March 2012 judgments entered against them on the various lenders' counterclaims.¹⁸

On 16 December 2013, Wells Fargo moved to dismiss the appeals in COA13-1303 of Darryl Strack; James K. Tighe, Jr.; Christa S. Tighe; and Renee Miller (collectively, "the bankruptcy appellants"). The motion was referred to this panel by order entered 6 January 2014. In June and July 2012, the bankruptcy appellants filed cases under Chapter 7 of the United States Bankruptcy Code. In September and October 2012, all of the bankruptcy appellants' obligations to Wells Fargo arising from the costs order and the judgments on Wells Fargo's counterclaims were discharged. Wells Fargo asserts that the bankruptcy appellants could recover a windfall if this Court resolves this appeal in Plaintiffs' favor. In light of the result reached in this matter, resolving all issues in favor of the lenders as discussed below, we dismiss as moot Wells Fargo's motion to dismiss.

Discussion

Plaintiffs argue that the trial court erred in granting the lenders' motion for summary judgment on the claims for (1) negligence and negligent misrepresentation and (2) UDTP.¹⁹ We affirm.

I. Standard of review

It is well settled that summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as

18. On 8 August 2013, in COA13-1304, various plaintiffs gave notice of appeal from the 16 February 2012 Anderson summary judgment order and the 19 March 2012 cost order. On 18 November 2013, some of those plaintiff-appellants gave notice that they were withdrawing their appeals as to the Anderson summary judgment order, but did not withdraw their appeals from the cost order. However, on 30 April 2014, the remaining plaintiff-appellants gave notice to this Court that they had reached a final settlement of all claims against Anderson, rendering the appeal in COA13-1304 moot. They moved to dismiss that appeal, and this Court granted that motion and dismissed the appeal in COA13-1304 by order entered 30 April 2014.

19. Plaintiffs have abandoned their appeals as to the trial court's grant of summary judgment on their claims for fraud and civil conspiracy by failing to argue them in their brief. *See* N.C.R. App. P. 28(a).

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a matter of law. The record is considered in the light most favorable to the party opposing the motion.

Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP, 350 N.C. 214, 219-20, 513 S.E.2d 320, 324 (1999) (citations, internal quotation marks, and emphasis omitted).

II. Negligence and negligent misrepresentation claims

[1] Plaintiffs first contend that the trial court erred in granting summary judgment on their negligence and negligent misrepresentation claims against the lenders. We disagree.

North Carolina expressly recognizes a cause of action in negligence based on negligent misrepresentation. It has long been held in North Carolina that the tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care.

Walker v. Town of Stoneville, 211 N.C. App. 24, 30, 712 S.E.2d 239, 244 (2011) (citations and internal quotation marks omitted).

In general, “a lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party.” *Camp v. Leonard*, 133 N.C. App. 554, 560, 515 S.E.2d 909, 913 (1999) (holding lender owed no duty to borrower with respect to inspection or appraisal of its collateral); *see also Lassiter v. Bank of N.C.*, 146 N.C. App. 264, 268, 551 S.E.2d 920, 923 (2001) (holding lender owed borrower no duty to inspect house being built with loan proceeds); *Perry v. Carolina Builders Corp.*, 128 N.C. App. 143, 150, 493 S.E.2d 814, 818 (1997) (holding lender owed no duty to ensure loan proceeds were used for a specific purpose in the absence of an express contract provision); *Wells v. N.C. Nat’l Bank*, 44 N.C. App. 592, 596, 261 S.E.2d 296, 298 (1980) (holding lender had no duty “to attend to details of the plaintiff’s [land] purchase other than the financial services it offered”).

Plaintiffs acknowledge that the lenders did not violate any duties expressly provided for in their loan agreements, but contend that the lenders owed them duties which “flow from at least two sources: [(1)] a common law negligence duty and [(2)] the Mortgage Lending Act.” We are unpersuaded by either contention.

A fiduciary duty arises when there has been a special confidence reposed in one who in equity and good conscience

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is bound to act in good faith and with due regard to the interests of the one reposing confidence. However, an ordinary debtor-creditor relationship generally does not give rise to such a special confidence: the mere existence of a debtor-creditor relationship between the parties does not create a fiduciary relationship. This is not to say, however, that a bank-customer relationship will never give rise to a fiduciary relationship given the proper circumstances.

Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 60-61, 418 S.E.2d 694, 699 (citations, internal quotation marks, and brackets omitted), *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992).

Plaintiffs cite this Court's opinion in *Dallaire v. Bank of Am., N.A.*, for the proposition that, "when a financial institution undertakes to provide a customer with a service *beyond that inherent in the creditor-debtor relationship*, it must do so reasonably and with due care." __ N.C. App. __, __ n.5, 738 S.E.2d 731, 735 n.5 (2012) (emphasis added). In *Dallaire*, we reversed and remanded a grant of summary judgment in favor of the bank because there existed a question of fact "as to whether or not [the lender] sought to give legal advice to [the investment purchasers]." *Id.* Likewise, Plaintiffs assert that the lenders here went beyond the role of commercial lending when they acted as "cheerleaders" and "promoters" of Grandfather Vistas by using Anderson and other appraisers to "churn[] out 'cookie cutter' appraisals," "interfered with the usual appraisal process," and "falsified loan documents and concealed the true purpose of the loans from underwriters[.]"²⁰

20. As noted *supra*, Anderson performed all the appraisals of founders' lots for SunTrust and Fifth Third, but Wells Fargo used other appraisers in its underwriting process and did not employ Anderson. In his appraisals, Anderson used only other lots within Grandfather Vistas as comparable properties, or "comps," a crucial part of the valuation process. Plaintiffs assert that the lenders withheld information about the buyback and other provisions in the purchase contracts in an effort to manipulate the appraisal process to ensure inflated values. Plaintiffs also argue that Anderson's use of other Grandfather Vistas' lots as comps shows that the appraisal process was "rigged" toward inflated values. However, at least two of the Wells Fargo appraisers testified that they were aware of the buyback provision and considered the provision in performing their appraisals. One of those appraisers took the further step of using properties located from 16 to 23 miles outside of Grandfather Vistas as comps in his appraisal. *The Wells Fargo appraisers still valued each founder's lot at \$500,000*. Accordingly, even if there were a cause of action for negligent underwriting of loans for the purchase of real estate, Plaintiffs would be unlikely to prevail since the actions complained of (concealment of contract agreement provisions and the use of Anderson for numerous appraisals) do not appear to have had *any* impact on the appraised values of the founders' lots.

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However, our Supreme Court has recently reversed this Court's decision in *Dallaire*, reaffirming that, "[g]enerally, the home loan process is regarded as an arm's length transaction between parties of equal bargaining power and, absent exceptional circumstances, will not give rise to a fiduciary duty." *Dallaire v. Bank of Am., N.A.*, __ N.C. __, __ S.E.2d __, __ (2014), available at 2014 N.C. LEXIS 408. The Supreme Court went on to hold that, even in an exceptional circumstance where a loan officer owes a borrower some duty beyond the terms of the loan agreement, "a borrower cannot establish a claim for negligent misrepresentation based on a loan officer's statements . . . if the borrower fails to make reasonable inquiry into the validity of those statements." *Id.* at __, __ S.E.2d at __. Thus, where the borrowers

put forth no evidence that they made [such an] inquiry or were prevented from doing so, they have failed to demonstrate the justified reliance necessary to support their negligent misrepresentation claim. . . . [and] the trial court [does] not err in granting summary judgment for [the lender on the borrowers'] negligent misrepresentation claim.

Id. at __, __ S.E.2d at __.

Here, far from being exceptional circumstances outside the normal creditor-debtor relationship, appraisals and underwriting are integral parts of the commercial lending process. Plaintiffs cite no case from this State in which courts have found that a lender had a common law duty to the borrower regarding the manner in which the lender undertook appraisals or underwriting in connection with making loans. To the contrary, our State's case law is clear that such appraisals and underwriting are for the benefit of the lenders, not for the borrowers. *See, e.g., Camp*, 133 N.C. App. at 559, 515 S.E.2d at 913. Simply put, in North Carolina, there is no cause of action for negligent underwriting of loans for the purchase of real estate. Further, even were there such a claim under the law of this State, Plaintiffs have forecast no evidence that they undertook their own independent inquiries into the values of the lots (such as obtaining their own independent appraisals) or were prevented from doing so. Accordingly, Plaintiffs could not demonstrate the justified reliance necessary to support a negligent misrepresentation claim.

We find Plaintiffs' reliance on the lenders' alleged violations of the Mortgage Lending Act ("MLA")²¹ equally unavailing. Plaintiffs cite *Guyton v. FM Lending Servs., Inc.*, for the proposition that the MLA

21. The MLA was repealed effective 31 July 2009. N.C. Sess. Laws 2009-374, s. 1.

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provides a source of duties for tort-based causes of action because “the relevant statutory language [of the MLA] expressly prohibits misrepresentation or concealment of the material facts likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan.” 199 N.C. App. 30, 43, 681 S.E.2d 465, 475 (2009) (citations, internal quotation marks, ellipsis, and some brackets omitted)). In *Guyton*, the plaintiffs alleged that the lender defendant “actively and intentionally withheld the information that the property lay in a flood plain — including retention of surveys and certifications that contained relevant information and affirmative obstruction of [the p]laintiffs’ access to important information — in order to induce [the p]laintiffs to purchase the property.” *Id.* at 42-43, 681 S.E.2d at 475.

We reject Plaintiffs’ reliance on the MLA on two bases. First, the MLA applied only to loans taken by natural persons “*primarily for personal, family, or household use*, primarily secured by either a mortgage or deed of trust on residential real property located in North Carolina.” N.C. Gen. Stat. § 53-243.01(15) (2005) (emphasis added). Here, it is undisputed that the loans taken out by Plaintiffs were to finance the purchase of founders’ lots as *investments* and not for residential use by the investment purchasers. The founders’ lots were explicitly marketed as investment vehicles. The evidence in the record is that *no* Plaintiff took out a loan to purchase a founder’s lot “primarily for personal, family, or household use[.]” *Id.* Plaintiffs’ own complaint describes the sale of the founders’ lots as an “Investment Scheme” and consistently refers to the investment purchasers as “investors.” The investment purchasers, who purchased the founders’ lots *explicitly* and intentionally for investment purposes, cannot now claim the protection of a statutory scheme *explicitly* intended to govern residential rather than investment real estate mortgages.

Despite the fact that the loans were indisputably for investment purposes, Plaintiffs urge that the lenders are estopped from avoiding the applicability of the MLA on this basis because “[t]he lenders treated the loans as residential or home loans in order to avoid their own commercial/investment guidelines which would have prevented these loans from meeting the 90% [loan-to-value] financial condition in the purchase contracts. The lenders’ guidelines for investment loans would permit loans only in the range of 65% to 80% [loan-to-value].” Plaintiffs defeat their own argument on this point. The lenders’ internal guidelines regarding permitted loan-to-value ratios for various types of loans are not intended to protect Plaintiffs or any other borrowers. Rather, those policies are intended to protect the *lenders* and presumably reflect an

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assessment of the relative riskiness of residential versus commercial real estate loans. The MLA applied to residential loans and was intended to protect residential borrowers. *See* N.C. Gen. Stat. § 53-243.01(15). As noted *supra*, Plaintiffs were *not* residential borrowers and their loans were *not*, in fact, residential loans. No labeling or treatment by the lenders in their internal underwriting process altered the loans' true nature so as to bring them under the ambit of the MLA.

Second, as discussed *supra*, even if the MLA did apply to Plaintiffs' loans such that it could be the source of duties for their negligence-based causes of action, for the reasons previously stated, Plaintiffs could not demonstrate the justified reliance required to prevail on those claims. In sum, we reject both of Plaintiffs' arguments and conclude that the trial court did not err in granting summary judgment for the lenders on the negligence-based claims.

III. UDTP claims

[2] Plaintiffs Decker, Fazzari, McIvor, McQuay, and Owens²² (collectively, "the Fifth Third plaintiffs") also contend that the trial court erred in granting summary judgment on their UDTP claims against Fifth Third. We disagree.

It is well established that

[a] claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75.1-1 must allege that: (1) the defendant committed an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to the plaintiff's business. Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show actual reliance on the alleged misrepresentation in order to establish that the alleged misrepresentation proximately caused the injury of which [the] plaintiff complains.

Sunset Beach Dev., LLC v. Amec, Inc., 196 N.C. App. 202, 211, 675 S.E.2d 46, 53 (2009) (citations, internal quotation marks, and brackets omitted). "Actual reliance is demonstrated by evidence [the] plaintiff acted

22. Plaintiffs did not assert any claims under Chapter 75 against Wells Fargo. In addition, the appeal in COA13-1303 as to SunTrust was dismissed by order of this Court entered 7 March 2014. The five plaintiffs named here are the only Fifth Third borrowers remaining in this appeal.

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or refrained from acting in a certain manner due to [the] defendant's representations." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 663, 464 S.E.2d 47, 57 (1995) (citation omitted). Where a plaintiff cannot forecast evidence of actual reliance, summary judgment for the defendants is proper. *Sunset Beach Dev., LLC*, 196 N.C. App. at 212, 675 S.E.2d at 54.

On appeal, the Fifth Third plaintiffs allege that they relied on misrepresentations by Fifth Third and the appraisals by Anderson in making their decisions to take out the loans on which they later defaulted. The Fifth Third plaintiffs also assert that Fifth Third wrongfully withheld the buyback agreements from their underwriters and Anderson in an effort to inflate the appraisals.

As for the alleged misrepresentations, our review of the record reveals that Decker, Fazzari, McIvor, and McQuay all testified that Fifth Third did not make any misrepresentations to them in regard to their loans. Owens testified that an employee of Fifth Third told him that Grandfather Vistas was "beautiful, that it should do well" and vouched that the developers were the "real deal."²³ However, even if these statements could be construed as factual misrepresentations as opposed to mere expressions of opinion, the remarks were made *after* Owens signed the purchase agreement, and, not surprisingly, Owens testified that he did not rely on the statements in deciding whether to buy his lot.

In regard to the assertion that Fifth Third withheld the buyback agreements from Anderson, the Fifth Third plaintiffs fail to note that Anderson testified to having a copy of at least one contract which included the buyback agreement. Further, as noted in footnote 20 *supra*, appraisers for Wells Fargo who *were* provided with copies of the buyback agreement still reached a value of \$500,000 for each of the founders' lots they appraised.

As for the Fifth Third plaintiffs' alleged reliance on Anderson's appraisals, we find this appeal governed by the same reasoning employed in *In re Fifth Third Bank, N.A.*, and *Williams*, and in light of the virtually identical facts presented here, we reach the same result. As noted *supra*, those appeals involved, *inter alia*, UDTP claims by investors who took out loans from Fifth Third to purchase lots in a development

23. The Fifth Third plaintiffs quote an additional alleged affirmative misrepresentation made by an agent of the bank to another borrower, but that borrower is not a party to this appeal. Accordingly, the statement is irrelevant in resolving the appeal of the Fifth Third plaintiffs.

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called the Villages of Penland as part of an investment scheme.²⁴ *In re Fifth Third Bank, N.A.*, 217 N.C. App. at 202, 719 S.E.2d at 173-74. In the Penland cases, as here, the plaintiffs were purchasers of lots in another real estate investment scheme in which Anderson (and another appraiser) appraised a large number of lots at an identical, inflated value to meet the loan-to-value conditions required to obtain bank loans. *Id.* at 207-08, 719 S.E.2d at 177. The Penland scheme, like that here, involved contracts that promised repurchase of lots with a guaranteed profit for the investors. *Id.* at 207, 719 S.E.2d at 177. As with Grandfather Vistas, the development was never completed, and investors were left with large loans and lots worth only a fraction of their appraised values. *Id.* at 202, 719 S.E.2d at 174.

In *Williams*, we noted that, “[w]here a plaintiff cannot forecast evidence of actual reliance, summary judgment for the defendants is proper[.]” __ N.C. App. at __, 724 S.E.2d at 549 (citation omitted), and then observed:

All of the evidence shows that [the p]laintiffs made their decisions to invest in the development and contracted to do so without any awareness of, much less reliance on, the Anderson[] appraisals. Even had . . . Anderson[] appraised the lots differently, [the p]laintiffs would still have been obligated to purchase them at the prices agreed to in the purchase contracts. [The p]laintiffs cannot have relied on information they did not see and did not know existed (some of which did not, in fact, yet exist) at the time of their decisions. Because [the p]laintiffs forecast no evidence that they actually relied on the appraisals in deciding to make their investments, the trial court properly granted summary judgment to . . . Anderson[].

Id. at __, 724 S.E.2d at 550. Likewise, in *In re Fifth Third Bank, N.A.*, in considering summary judgment for Fifth Third on UDTP claims, we concluded that “no evidence tend[ed] to show that [the p]laintiffs’ decision to invest . . . bore any relation to the appraised value of the lots which they purchased or that [the p]laintiffs relied in any way upon the allegedly defective appraisals which [Fifth Third] procured when they decided to invest . . .” 217 N.C. App. at 211, 719 S.E.2d at 179. As a result,

24. *Williams* was an appeal from the grant of summary judgment in favor of Anderson, while *In re Fifth Third Bank, N.A.*, arose from a summary judgment order in favor of the lender. We refer to the appeals collectively as “the Penland cases.”

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we affirmed summary judgment in favor of Fifth Third on the plaintiffs' UDTP claims. *Id.* at 213, 719 S.E.2d at 180.

Here, just as in the Penland cases, the purchase contracts were not subject to any appraisal contingencies.²⁵ Just as in the Penland cases, the Fifth Third plaintiffs signed their purchase contracts, obligating them to go forward with the purchase of the founders' lots, *before Anderson had even performed the appraisals* in question. Thus, just as in the Penland cases, the Fifth Third plaintiffs "cannot have relied on information they did not see and did not know existed (some of which did not, in fact, yet exist) at the time of their decisions" to sign the purchase contracts.²⁶ See *Williams*, __ N.C. App. at __, 724 S.E.2d at 550. We are utterly unable to distinguish the relevant circumstances here from those presented in the Penland cases, and thus we reach the same result. See *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"). In light of the Fifth Third plaintiffs' inability to show either misrepresentations or reliance on the allegedly negligent appraisals, the trial court

25. The Fifth Third plaintiffs assert that the purchase agreements *did* contain an appraisal contingency condition, to wit, language stating that a buyer "must be able to obtain a conventional loan at a fixed rate in the principal amount of 90% [loan-to-value] for a term of 30 years at an initial interest rate not to exceed 7.5% per annum" However, *none* of the purchasers obtained 30-year conventional loans on the terms specified in this language. Rather, each of the loans involved much shorter terms and higher rates of interest.

26. As in the Penland cases, the Fifth Third plaintiffs' lack of reliance on the appraisals is not surprising since neither the developers nor the purchasers of the lots were concerned about the actual value of the founders' lots. The purchase of the lots by the Fifth Third plaintiffs was simply a necessary step in an investment scheme which they believed would guarantee them a quick \$125,000 profit. Under the scheme, the profit for the Fifth Third plaintiffs had nothing to do with the value of the lots themselves; all that mattered was the promise in the purchase contract for the developers to (1) pay the interest on the purchase loans and (2) repurchase each lot for \$125,000 more than the sales price in one year. Indeed, it is unclear whether the sales of the founders' lots were more accurately characterized as securities transactions, which fall outside the provisions of Chapter 75. See *In re Fifth Third, N.A.*, 217 N.C. App. at 211 n.6, 719 S.E.2d at 179 n.6 ("The fact that the purchase price that [the p]laintiffs paid for the lots in question was identical and bore no apparent relation to the actual value of the relevant lots in their undeveloped state may cut against, instead of in favor of, [the p]laintiffs' position. The fact that each lot was appraised and priced at the same value may suggest that the investments in question amounted to a securities transaction not subject to the UDTP [Act], rather than a loan.") (citations omitted).

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properly granted summary judgment on their UDTP claims. Accordingly, the Fifth Third plaintiffs' UDTP arguments are overruled.

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

EARL WAYNE FORTNER AND HENRY FORTNER, CO-ADMINISTRATORS OF THE
ESTATE OF JOHNNIE H. FORTNER, SR., PLAINTIFFS

v.

JONATHAN A. HORNBUCKLE AND LYNDA HORNBUCKLE FORTNER,
DEFENDANTS AND THIRD PARTY PLAINTIFFS

v.

EARL WAYNE FORTNER AND HENRY FORTNER,
THIRD PARTY DEFENDANTS

No. COA13-1209

Filed 5 August 2014

1. Gifts—retained deeds—intent retain control—jury question

The trial court did not err by denying defendant's motion for a directed verdict in an action involving the apportionment of estate tax liability where the decedent had executed five deeds conveying real property but retained the deeds; the deeds were executed after his death; plaintiffs, the personal representatives of the estate, filed this action seeking to recover the apportioned share of the estate taxes; and defendant contended that the transfers had been gifts. The evidence was sufficient to raise a question for the jury as to whether the decedent intended to retain control over the properties at issue.

2. Taxation—apportionment of estate tax—instructions

A case involving the apportionment of estate tax liability was remanded for an error in the instructions where the decedent executed deeds to transfer real property but held the deeds, the deeds were recorded after his death, and defendants contended that the transfers had been gifts. The confusion arose from the trial court's simultaneous and condensed discussion of the doctrines of completed gifts (requested by defendants) and retained interests (requested by plaintiffs). The two doctrines are related but have distinct elements and required separate consideration by the jury.

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3. Estates—administration—need for funds in joint checking account—factual issue for jury

The trial court erred by failing to properly instruct the jury on the issue of whether funds contained in a joint checking account were necessary to satisfy the claims against the estate. It is clear from the jury instructions that the trial court failed to direct the jury to determine whether the funds were actually needed to satisfy claims against the estate. Although plaintiffs argued that the error was cured by the trial court's insertion of language in the judgment, the question of whether the estate needed the funds to satisfy claims against the estate was a factual issue for the jury.

Appeal by defendants from judgment entered 8 April 2013 by Judge James U. Downs in Swain County Superior Court. Heard in the Court of Appeals 20 February 2014.

Moody & Brigham, PLLC, by Fred H. Moody, Jr., for plaintiffs-appellees.

McGuire, Wood & Bissette, P.A., by Mary E. Euler, Joseph P. McGuire, and Starling B. Underwood III, for defendants-appellants.

DAVIS, Judge.

Jonathan A. Hornbuckle (“Jonathan”) and Lynda Hornbuckle Fortner (“Lynda”) (collectively “Defendants”) appeal from the trial court's entry of judgment upon a jury verdict awarding Earl Wayne Fortner (“Earl”) and Henry Fortner (“Henry”) (collectively “Plaintiffs”), co-administrators of the Estate of Johnnie H. Fortner, Sr. (“the Estate”), an apportioned share of the Estate's estate tax liability. On appeal, Defendants contend that the trial court erred by (1) denying their motion for a directed verdict; and (2) failing to appropriately instruct the jury. After careful review, we vacate the judgment and remand for a new trial.

Factual Background

Lynda and Johnnie H. Fortner, Sr. (“Johnnie”) lived together and held themselves out to the public as husband and wife — although they were not actually married — from 1976 until 1988 and then from 1998 until Johnnie's death on 23 January 2007. Johnnie died intestate and two of his sons, Earl and Henry, were appointed as co-administrators of the Estate. At the time of his death, Johnnie owned a number of parcels of real property, five of which are pertinent to the present case. Also, in

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2005, Johnnie and Lynda opened a joint checking account (“the Joint Checking Account”) with a right of survivorship at the State Employees’ Credit Union in Bryson City, North Carolina.

In August and October of 2006, Johnnie executed three general warranty deeds to Jonathan, Lynda’s son, encompassing (1) a 154-acre tract known as the “Round Hill Property”; (2) an 11.14-acre tract known as “Conley’s Creek Property”; and (3) a 2.95-acre tract known as the “Macktown Property.” Johnnie also executed two general warranty deeds to Lynda for a 14.74-acre tract known as the “Galbraith Creek Property” and a 9.3-acre tract known as the “Shoal Creek Property.”

In October of 2006, Johnnie placed all five deeds in a manila envelope, which he handed to Lynda while the two of them were alone in his office. He then instructed her to “take [them] home, put [them] up and keep [her] mouth shut.” Lynda took the deeds home and placed them in a dresser drawer in her bedroom. On 23 January 2007, Johnnie died intestate. The five deeds were recorded in the Jackson and Swain County Register of Deeds offices on 5 February 2007.

Plaintiffs subsequently filed an action in Swain County Superior Court on 7 June 2011 alleging, in pertinent part, as follows:

4. That during his lifetime, Johnnie H. Fortner, Sr. executed five (5) certain deeds purporting to convey real property located in Swain and Jackson Counties, North Carolina, to the Defendants without consideration.

....

7. That the fair market values of said tracts or parcels of land were require[d] to be included in the gross estate of Johnnie H. Fortner, Sr. for purposes of estate . . . taxes.

8. That the Plaintiffs have paid or will pay from the assets of the Estate of Johnnie H. Fortner, Sr., estate . . . taxes upon the gross taxable Estate of Johnnie H. Fortner, Sr., including taxes attributable to the parcels of real property herein described.

9. That the Plaintiffs, as personal representatives of the Estate of Johnnie H. Fortner, Sr., are entitled to recover from the Defendants an apportioned share of the estate . . . taxes paid by the Estate of Johnnie H. Fortner, Sr., which share shall be an amount which bears the same ratio to the total tax paid as the value of such tracts or parcels of land bear to the taxable estate.

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10. That the Plaintiffs are also entitled to recover from the Defendants an apportioned share of any and all interest and penalty on the estate . . . taxes paid by the Estate of Johnnie H. Fortner, Sr.

11. That at the time of the death of Johnnie H. Fortner, Sr., he and the Defendant, Lynda Hornbuckle Fortner, as joint tenants with right of survivorship, owned account #3003309 at the State Employees Credit Union, Bryson City, N.C.

12. That at the time of the death of Johnnie H. Fortner, Sr., said account had a balance of \$249,121.63.

13. That, to the information and belief of the Plaintiffs, all of the funds included in said account had been contributed to said account from the funds of Johnnie H. Fortner, Sr.

14. That, to the information and belief of the Plaintiffs, the assets of the Estate of Johnnie H. Fortner, Sr. are not sufficient to pay the debts of said estate.

15. That the Plaintiffs are entitled to recover of the Defendant, Lynda Hornbuckle Fortner, the sum of \$249,121.63 to be used solely for the payment of debts of the Estate of Johnnie H. Fortner, Sr., which are not payable from the other assets of the Estate.

16. That, alternatively, if the Plaintiffs are not able to recover the sum of \$249,121.63 from the Defendant Lynda Hornbuckle Fortner, said sum was required to be included in the gross estate of Johnnie H. Fortner, Sr. for purposes of estate . . . taxes and the Plaintiffs have paid or will pay from the assets of the Estate of Johnnie H. Fortner, Sr. estate . . . taxes upon the gross taxable estate of Johnnie H. Fortner, Sr. including taxes attributable to the bank account hereinabove referred to and are entitled to recover from the Defendant Lynda Hornbuckle Fortner an apportioned share of the estate . . . taxes paid by the Estate of Johnnie H. Fortner, Sr., which share shall be an amount which bears the same ratio to the total tax paid as the value of said account bears to the taxable estate and are entitled to recover from the Defendant, Lynda Hornbuckle Fortner an apportioned share of any and all interest and penalty on the estate . . . taxes paid by the Estate of Johnnie H. Fortner, Sr.

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Defendants filed an answer, counterclaim, and third-party complaint¹ on 17 August 2011. With regard to the five deeded properties, Defendants asserted that the transfers to Lynda and Jonathan constituted completed gifts and that as a result (1) the five properties were not properly includable in the Estate for purposes of calculating its tax liability; and (2) Plaintiffs were therefore not entitled to recover an apportioned share of the Estate's tax liability from Defendants attributable to those properties. Defendants also contended that the Estate should not be permitted to use any funds in the Joint Checking Account to pay the debts of the Estate.

A jury trial was held in Swain County Superior Court on 6 March 2013. The jury returned a verdict in favor of Plaintiffs, responding to the issues on the verdict sheet as follows:

WE, THE JURY, AS OUR UNANIMOUS VERDICT,
ANSWER AS FOLLOWS:

1. Are the Plaintiffs as representatives of the estate of Johnnie H. Fortner, Sr. entitled to an apportioned share of the federal and state estate taxes and interest on the asset referred to as:

- | | |
|---|---------------------|
| Round Hill Property | Answer: <u>yes</u> |
| 1a. If so, what amount? | <u>\$541,275.69</u> |
| 2. Conley's Creek Property | Answer: <u>yes</u> |
| 2a. If so, what amount? | <u>\$58,210.18</u> |
| 3. Macktown Property | Answer: <u>yes</u> |
| 3a. If so, what amount? | <u>\$23,968.90</u> |
| 4. Galbraith Creek Property | Answer: <u>yes</u> |
| 4a. If so, what amount? | <u>\$128,273.12</u> |
| 5. Paul Cooper/
Shoal Creek Property | Answer: <u>yes</u> |
| 5a. If so, what amount? | <u>\$129,853.48</u> |

1. The counterclaim (brought against Earl and Henry in their capacities as co-administrators of the Estate) and the third-party complaint (brought against Earl and Henry individually) both alleged a breach of fiduciary duty resulting from their alleged overstatement of the tax liability owed by the Estate and failure to sell real property to produce sufficient funds to pay the debts of the Estate.

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6. What amount, if any, are the Plaintiffs as representatives of the estate of Johnnie H. Fortner, Sr. entitled to recover from the joint account with right of Survivorship at the State Employees Credit Union having an approximate balance of \$248,322.00 at the time of Mr. Fortner, Sr.'s death?

ANSWER: \$248,322.00 = 100%

7. If none, what is the amount of the apportioned share of the federal and state estate taxes and interest that is attributable to the State Employees Credit Union account that the Plaintiffs, as representatives of the Estate of Johnnie H. Fortner, Sr., are entitled to recover from Lynda Hornbuckle Fortner?

ANSWER: _____.

Defendants filed a timely notice of appeal to this Court.

Analysis**I. Denial of Motion for Directed Verdict**

[1] Defendants initially argue that the trial court erred in denying their motion for a directed verdict based on their contention that the transfer of the five deeded properties constituted a completed gift such that the Estate was not entitled to an apportioned share of its tax liability attributable to these properties. We disagree.

In reviewing the denial of a motion for a directed verdict, we examine

whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant. The non-movant is given the benefit of every reasonable inference which may legitimately be drawn from the evidence, resolving contradictions, conflicts, and inconsistencies in the non-movant's favor. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim.

Trantham v. Michael L. Martin, Inc., ___ N.C. App. ___, ___, 745 S.E.2d 327, 331 (2013) (internal citations, quotation marks, and brackets omitted).

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The elements required to show the valid delivery of a deed in the form of a completed gift are “(1) an intention by the grantor to give the instrument legal effect according to its purport and tenor; (2) evidence of that intention by some word or act which discloses that the grantor put the instrument beyond his legal control; and (3) acquiescence by the grantees in such intention.” *Penninger v. Barrier*, 29 N.C. App. 312, 315, 224 S.E.2d 245, 247, *disc. review denied*, 290 N.C. 552, 226 S.E.2d 511 (1976) (emphasis omitted).

“A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential requisite of a gift inter vivos. The intention may be inferred from the relation of the parties and from all the facts and circumstances.” *McLean v. McLean*, 323 N.C. 543, 550, 374 S.E.2d 376, 381 (1988) (citation, quotation marks, brackets, and ellipses omitted).

Therefore, if the intent of the grantor is not to actually part with title to the property at issue but rather to retain an interest in it, there can be no completed transfer of the property. Accordingly, where evidence is introduced that calls into question the intention of the grantor, an issue of fact exists for resolution by the jury and the entry of a directed verdict on that issue is improper. *See Lerner Shops of N.C., Inc. v. Rosenthal*, 225 N.C. 316, 320, 34 S.E.2d 206, 208-09 (1945) (“There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so with the intent that it shall be taken by the grantee or by someone for him. Both the intent and act are necessary for a valid delivery. *Whether such existed is a question of fact to be found by the jury.*” (citation and quotation marks omitted and emphasis added)).

We find instructive our decision in *Penninger*. In *Penninger*, the decedent, approximately three years prior to his death, executed three deeds conveying property to the defendants. *Penninger*, 29 N.C. App. at 314-15, 224 S.E.2d at 246. The decedent, without informing the defendants of the existence of these deeds, instructed his attorney to keep possession of them and to deliver the deeds to the defendants after his death. *Id.* at 314, 224 S.E.2d at 246.

The plaintiff, the decedent’s next of kin and heir at law, filed an action to have the deeds declared null and void on the ground that the decedent “never at any time prior to his death released control over either of said deeds . . . and said deeds were never, in contemplation of law, delivered to the grantees or to anyone else for the use and benefit of the grantees

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with the intention at said time that title should pass as the instruments become effective as a conveyance.” *Id.* at 313, 224 S.E.2d at 246.

The decedent’s attorney — who had drafted the deeds and then kept them in his possession at the decedent’s direction — testified that had the decedent ever requested that he modify the deeds, “I imagine I would have but I don’t know. . . . I did whatever he instructed me to do” and that “I would have done what he wanted with these deeds to comply with his wishes.” *Id.* at 314, 224 S.E.2d at 246.

This Court emphasized in *Penninger* that the dispositive factor for whether a completed transfer of a deed has occurred is the intention of the grantor at the time of the execution of the deeds. *Id.* at 315, 224 S.E.2d at 247. Applying this principle, we held that the testimony by the decedent’s attorney “would certainly justify a reasonable inference that the grantor retained ultimate control over the deeds until his death. So long as a deed is within the control and subject to the authority of the grantor there is no delivery, without which there can be no deed.” *Id.* (citation and quotation marks omitted).

In the present case, Lynda testified, in pertinent part, as follows:

Q. Okay. And when did you first see those deeds?

A. I’m going to have to think here just a minute because all this is running together. I got these deeds — he gave me these deeds — we were at the office and it was in October.

Q. Was it October 25, the date that’s on those latest deeds?

A. I’m pretty sure it was.

Q. And how did he give you those deeds?

A. They were in a manilla [sic] folder, just stuck in it.

Q. And he handed it to you?

A. He handed it to me from — he was sitting in his chair and they were to the side of him. He pulled it out that way.

Q. And he may’ve said something to you, and I don’t want to ask you what he said, but he may’ve said something to you?

A. He said — yeah, he said a few words.

Q. And what did you do with the envelope and the deeds?

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A. I looked at them and seen what they were and I just — we were standing up, we was getting ready to go out of the office. And I just pitched them — the file over to my desk. And when we got to the door, he asked me a question and I said, it's right there on the desk. And I was instructed to get it, take it home, put it up and keep my mouth shut.

Q. And did you do that?

A. I done that.

Q. Where did you put the manilla [sic] envelope and the deeds?

A. I put them in a dresser drawer in the bedroom.

....

Q. Ms. Fortner, let me ask you this: If on October the 26th, or sometime after that, Johnny [sic] Fortner had asked you to go bring him that manilla [sic] envelope with those deeds in it, would you have done that?

MS. EULER: Objection.

THE COURT: Overruled.

BY THE WITNESS: (Resuming)

A. Yeah, I would have.

We are satisfied that sufficient evidence existed to support the denial of Defendants' motion for a directed verdict. Lynda's testimony creates a reasonable inference that Johnnie lacked the intent to fully relinquish control of the deeded properties at the time he handed the deeds to her — a key element of the delivery of a deed by a donor.

This conclusion is also supported by evidence presented by Plaintiffs at trial tending to show that Johnnie did not substantially alter his control and use of the deeded properties at issue after handing the deeds to Lynda. He continued to reside on the Galbraith Creek Property and to receive rental income from the Round Hill Property, the Macktown Property, and the Shoal Creek Property — just as he had before handing the deeds to Lynda. Lynda also testified that Johnnie was considering making improvements to the Conley's Creek Property.

This evidence was sufficient to raise a question for the jury as to whether Johnnie intended to retain control over the properties at

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issue. “There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so, with the intent that it shall be taken by grantee or some one for him. Both the intent and the act are necessary to the valid delivery. Whether such existed is a question of fact to be found by the jury.” *Huddleston v. Hardy*, 164 N.C. 210, 212-13, 80 S.E. 158, 159 (1913) (citation and quotation marks omitted).

Defendants contend that Johnnie’s donative intent was established by the fact that he gave the deeds directly to Lynda, one of the donees, instead of to a third party. However, in *Huddleston*, the Supreme Court emphasized that “the controlling test of delivery is the intention of the grantor to part with the deed and put it beyond his control, and that *this intent is an issue of fact, to be passed on by a jury.*” *Id.* at 213, 80 S.E. at 160 (emphasis added). Therefore while the giving of a deed from the donor directly to the donee may constitute *some* evidence of donative intent for a completed gift, it does not establish as a matter of law that a completed gift did, in fact, occur where evidence also exists tending to show that the donor did not intend to put the deed beyond his legal control.

We also reject Defendants’ argument that evidence of Johnnie’s subsequent actions regarding the properties is irrelevant to his intent at the time he handed the deeds to Lynda. We believe such actions could properly be used by the jury to ascertain Johnnie’s intent at the time he gave Lynda the deeds. The weight to be given this evidence was for the jury to decide. Accordingly, the trial court properly denied Defendants’ motion for a directed verdict.

II. Jury Instructions

[2] Defendants next make a series of arguments challenging the trial court’s jury instructions.

On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

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Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations and quotation marks omitted).

Our Supreme Court has stated that “jury instructions should be as clear as practicable[.]” *Swink v. Weintraub*, 195 N.C. App. 133, 157, 672 S.E.2d 53, 69 (2009) (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 812, 693 S.E.2d 352 (2010). This is because

[t]he chief purposes to be attained or accomplished by the court in its charge to the jury are clarification of the issues, elimination of extraneous matters, and declaration and explanation of the law arising on the evidence in the case. These are essential in cases requiring the intervention of a jury. The jury should see the issues stripped of all redundant and confusing matters, and in as clear a light as practicable. The chief object contemplated in the charge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved.

Stern Fish Co. v. Snowden, 233 N.C. 269, 63 S.E.2d 557, 559 (1951) (internal citations and quotation marks omitted).

Defendants contend that the trial court committed reversible error in its jury instructions both as to the deeded properties and as to the Joint Checking Account. We address each of their arguments in turn.

A. Deeded Properties

The trial court’s instructions to the jury with regard to the deeded properties consisted of the following:

Members of the jury, there are a number of issues you’ll be called upon to consider, and let’s look at the first five. They’re broken down in five prospective tracts of land that were deeds signed by Mr. Fortner, Sr., to Lynda Fortner for her and/or Jonathan Hornbuckle. And the principles that I give you with regard to what the plaintiff must prove by the greater weight of the evidence will apply on each of these tracts. I’m not going to go over all of them, the same five times. You’d run me off if I did that. I’m not going to run that risk. But you will consider each of these tracts separate and apart, one from the other. If you answer one or more a certain way, that does not bind

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you to answer the remainder of them a certain way. The contrary is true.

Now, on each of these issues the burden of proof is upon the plaintiffs, the Fortners, as administrators of the father's estate, to satisfy from the evidence and by its greater weight that you should answer that issue in their favor.

The issue essentially states as to each tract: Are the plaintiffs, as representatives of the estate of John H. Fortner, Sr., entitled to an apportioned share of the federal and state estate taxes and interest on the asset referred to as — and it goes down to each one, each one of those properties.

The plaintiff says and contends that Mr. Fortner executed those deeds and transferred the property by doing so but yet retained the interest in the land and each tract of land, each, some or all of them. And the defendants, on the other hand, say and contend — the defendants on the other hand say that he did not retain the interest but rather that they received it as a gift from him, that he did not retain control and ownership of the property.

Now, transferring real estate or any asset, more specifically here real estate, but retaining ownership of that property may consists [sic] of control, possession, living or occupying the property in question, deriving and collecting for his individual benefit any income that the property produced and any other facts and circumstances that you find from the evidence to the extent of by its greater weight that may give rise to the contention that he retained ownership of the property albeit he'd given deeds for it.

On the other hand, with regard to the defendant's contentions, that if he had transferred the property and not retained ownership of it, that he had given title to it. A gift means that Mr. Fortner intended to give up all his ownership and control of the property immediately, not contingent. And intent is a mental attitude seldom proven by what's called direct evidence, the evidence of an eyewitness. Intent is proven by circumstances which it may be inferred. And every person regardless of what they've

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done is presumed to have intended the natural and probable consequences of their voluntary actions as opposed to involuntary.

And furthermore, the defendants contend that Mr. Fortner actually or he constructively transferred the property in the form of a gift. An actual delivery occurs when there is a direct transfer to another of ownership or control of something. And constructive delivery occurs when, although there is no actual delivery ownership and control of something is indirectly transferred.

Therefore, as to each of those issues on the numerical, 1, 2, 3, 4 and 5 parts of it, if you find from the evidence and by its greater weight, and the plaintiffs have satisfied you to that extent considering each of them separate and apart, one from the other, that Mr. Fortner, Sr. transferred that deed or those deeds, as the case may be, to the property yet retained ownership, control and/or possession of the property, and that he intended to do so, and did not intend to convey it as a gift either actually or constructively, then it would be your duty to answer that issue yes, in favor of the administrators of the estate and against the recipients of the property, the defendants.

On the other hand, if you fail to so find those things and the plaintiffs have not satisfied you by the greater weight of the evidence to that extent, then — or you cannot say what the truth is, then you would answer that issue against the party who has the burden of proof or otherwise answering it no, then it'd be in favor of the recipients of the property and against the administrators of the estate.

To the extent that you answer any of them no, then you don't consider the subparts of 1(a), 2(a), 3(a), 4(a) or 5(a). But if you've answered those issues yes, that the estate is entitled to some apportioned share of the federal and state taxes for those — and interest on those properties, then it will be your duty to determine what that amount of taxes — what is the amount of those taxes. And the burden is again upon the representatives of the estate to satisfy you that, first of all, taxes are due and, second, in what amount.

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And I think as the lawyers have explained to you in their final arguments if you decide that no, the estate is not entitled to any apportioned estate taxes, that they were gifts, then the estate bears the burden of paying for the gift tax. If you find that there is some apportioned share due, then it would be the responsibility of the recipients of the property to contribute whatever amount you insert on that blank space. And you have the various testimonies to consider pro or con on these issues. It's for you to say what credibility to give them and what weight to give them if you deem them to be believable by the greater weight of the evidence.

So the Court charges as to any of the first — of the five issues, primary issues, and to the extent that the representatives of the estate have satisfied you that taxes are due, estate taxes are due, and the amount of those taxes, then you will insert that amount in a dollars and cents response, not yes or no, but a dollar and cents response as to issue 1(a), 2(a), 3(a), 4(a) or 5(a), one, some, or all of them as the case may be. On the other hand — and it'll be in some substantial amount in accordance with what the plaintiffs contend the taxes are.

On the other hand, if you're not so satisfied or you cannot say what the truth is, even on that issue, then you may answer at some substantially lesser amount in accordance with what the defendant's [sic] contend.

We are concerned by the lack of clarity in these instructions. Much of the confusion arose from the trial court's simultaneous and condensed discussion of the doctrines of completed gifts (requested by Defendants) and retained interests (requested by Plaintiffs) — two related yet distinct legal doctrines. *See Edwards v. Hardin*, 113 N.C. App. 613, 616, 439 S.E.2d 808, 810 (1994) (“It is misleading to embody in one issue two propositions as to which the jury might give different responses.” (citation and quotation marks omitted)), *disc. review improvidently allowed*, 339 N.C. 607, 453 S.E.2d 166 (1995).

As discussed above, in order to show a completed gift through the delivery of a deed, a party must show “(1) an intention by the grantor to give the instrument legal effect according to its purport and tenor; (2) evidence of that intention by some word or act which discloses that the grantor put the instrument beyond his legal control; and

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(3) acquiescence by the grantees in such intention.” *Penninger*, 29 N.C. App. at 315, 224 S.E.2d at 247 (emphasis omitted).

With regard to the doctrine of retained interests, both parties agree that the most relevant provision of law applying this principle in the context of apportionment of federal estate taxes is 26 C.F.R. § 20.2036-1(a)(3)(i), a tax code regulation promulgated under the authority of 26 U.S.C. § 2036. The test for determining whether an interest in property was retained by the donor is whether before his death the decedent retained or reserved “[t]he use, possession, right to income, or other enjoyment of the transferred property.” 26 C.F.R. § 20.2036-1(a)(3)(i) (2013). If so, the property in question is properly includable in the decedent’s gross estate for the purpose of calculating federal estate tax liability. *Id.*

The United States Tax Court has held that

[a]s used in section 2036(a)(1), the term “enjoyment” has been described as synonymous with substantial present economic benefit. Regulations additionally provide that use, possession, right to income, or other enjoyment of transferred property is considered as having been retained or reserved to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit. Moreover, possession or enjoyment of transferred property is retained for purposes of section 2036(a)(1) where there is an express or implied understanding to that effect among the parties at the time of the transfer, even if the retained interest is not legally enforceable. The existence or nonexistence of such an understanding is determined from all of the facts and circumstances surrounding both the transfer itself and the subsequent use of the property.

Estate of Strangi v. Comm’r, 85 T.C.M. (CCH) 1331, 1336 (2003) (internal citations and quotation marks omitted), *aff’d*, 417 F.3d 468 (5th Cir. 2005).

Therefore, while the doctrines of completed gifts and retained interests are not unrelated, they each have distinct elements and required separate consideration by the jury. We believe that the trial court’s instructions failed to properly explain these principles to the jurors in a manner sufficient to allow them to understand these concepts and properly apply them to the facts of this case.

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The confusion engendered by the jury instructions was then compounded by the manner in which the issues were listed on the verdict sheet. This Court has held with regard to verdict sheets that

[t]he form and the number of issues submitted to the jury is within the trial court's discretion. However, the issues should be formulated so as to present separately the determinative issues of fact arising on the pleadings and evidence. It is misleading to embody in one issue two propositions as to which the jury might give different responses.

Godfrey v. Res-Care, Inc., 165 N.C. App. 68, 80, 598 S.E.2d 396, 404-05 (internal citations and quotation marks omitted), *disc. review denied*, 359 N.C. 67, 604 S.E.2d 310 (2004).

The legal issues raised by the facts and claims for relief in this case required the jury to decide a number of sub-issues before making the ultimate determination of what amounts, if any, Plaintiffs were entitled to recover as an apportioned share of the tax liability attributable to each of the five deeded properties. However, instead of setting out these sub-issues, the verdict sheet instead simply asked the jury to decide — as to each of the five properties — the ultimate issue of whether Plaintiffs were entitled to an apportioned share of the estate tax liability as to that property and, if so, in what amount. As a result, the likelihood of jury confusion was unacceptably high. Furthermore, we have no way of knowing the precise basis upon which the jury reached its verdict as to the deeded properties.

In sum, we conclude that Defendants have sufficiently demonstrated that the trial court's jury instructions and verdict sheet were "likely, in light of the entire charge, to mislead the jury." *See Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 177 (citation and quotation marks omitted). Accordingly, we must remand this action for a new trial. *See Edwards*, 113 N.C. App. at 616, 439 S.E.2d at 810 (remanding for new trial where "[t]he ambiguity of the manner in which the instructions were set forth and the uncertainty of the verdict rendered [were] indisputable").

B. Joint Checking Account

[3] Defendants' final argument is that the trial court erred in failing to submit to the jury the issue of whether funds contained in the Joint Checking Account were necessary to satisfy the claims against the Estate. We agree that the trial court's instructions on this issue likewise constituted reversible error, thereby necessitating a new trial.

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N.C. Gen. Stat. § 28A-15-10 provides that administrators of an estate can only access funds in a joint deposit account with a right of survivorship in order to satisfy the claims against an estate once all other assets of the estate have been exhausted.

When needed to satisfy claims against a decedent's estate, assets may be acquired by a personal representative or collector from the following sources:

....

(3) Joint deposit accounts with right of survivorship created by decedent pursuant to the provisions of G.S. 41-2.1 or otherwise

....

Such assets shall be acquired solely for the purpose of satisfying such claims, however, and shall not be available for distribution to heirs or devisees.

N.C. Gen. Stat. § 28A-15-10(a) (2013) (emphasis added).

Defendants argue that had the jury properly been instructed that the Joint Checking Account could only be accessed as a source of funds by the Estate as a last resort, it could have reasonably concluded either that none of these funds, or that merely some limited portion of these funds, were actually needed to satisfy the claims against the Estate. Defendants further assert that evidence was presented at trial establishing that other assets did, in fact, exist in the Estate that could have been used to satisfy its tax obligations without resort to the funds in the Joint Checking Account.

The question of whether the Estate was entitled to recover funds from the Joint Checking Account was listed as Issue No. 6 on the verdict sheet and the trial court's instructions pertaining to that issue stated as follows:

Regardless of how you answer the issues 1 through 5 and subparts, you will go and consider issue number 6 which states: What amount, if any, are the plaintiffs, as representatives of the estate of Mr. Fortner, Sr., entitled to recover from the joint account [with] the right of survivorship of the State Employees' Credit Union having an approximate value or balance of \$248,322 at the time of Mr. Fortner, Sr.'s death. The burden of proof, again, is upon the representatives of the estate to satisfy you

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from the evidence by its greater weight that the estate is the owner or has the right to claim some portion of that account, and in turn, pay taxes on it.

But the defendants, on the other hand, say and contend that the total of it or a great portion of it was a gift or it had already been established and owned by the defendant, Lynda Hornbuckle Fortner. Therefore, the Court charges if you find from the evidence by its greater weight that the plaintiffs have satisfied you to that extent that some portion or all of that joint account with right of survivorship was retained by Mr. Fortner's estate at the time of his death, then it would be for you to say what that amount is in the answer provided.

At the top it says, what amount, if any. The plaintiffs say and contend it's a substantial amount, if not all of it. The defendants say and contend it's a substantially lessor [sic] amount, if any of it. But if you fail to so find or have a — cannot say what the truth is as to what that issue is, then you'll answer in some substantially lessor [sic] amount in accordance with what the defendants suggest, even to the sum of none.

Now, if you answered in any amount then that ends the lawsuit, or at least that ends the issues. Only if you say that there was none in that account that was attributable to Mr. Fortner's estate, then you'll go and consider issue number 7²

It is clear from the above-quoted portion of the jury instructions that the trial court failed to direct the jury to determine whether the funds contained in the Joint Checking Account were actually needed to satisfy claims against the Estate. Plaintiffs concede that the trial court erred in

2. The trial court then proceeded to separately instruct the jury on the issue denominated on the verdict sheet as Issue No. 7, which asked the jury to decide — assuming it determined that Plaintiffs were not entitled to any of the funds in the Joint Checking Account under Issue No. 6 — the following issue: "If none, what is the amount of the apportioned share of the federal and state estate taxes and interest that is attributable to the State Employees' Credit Union account that the Plaintiffs, as representatives of the Estate of Johnnie H. Fortner, Sr., are entitled to recover from Lynda Hornbuckle Fortner?" The manner in which Issue No. 6 and Issue No. 7 were presented to the jury as separate and distinct issues, each asking the jury to determine whether or not Plaintiffs were entitled to recover funds from the Joint Checking Account, also likely served to confuse the jury.

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failing to so instruct the jury but argue that the error was cured by the trial court's insertion of language in the third paragraph of the judgment stating that with regard to the sum of \$248,322.00 awarded by the jury to Plaintiffs in its verdict as to Issue No. 6, "said sum shall be used solely for the purpose of satisfying claims against the Estate of Johnnie H. Fortner, Sr. which exceed all of the other assets of the Estate of Johnnie H. Fortner, Sr. . . ."

We are unpersuaded by Plaintiff's argument. The question of whether the Estate needed all, or some portion of, the funds in the Joint Checking Account in order to satisfy claims against the Estate was a factual issue for the jury. In the absence of an instruction on this point, the jury would have felt no need to first determine whether the remaining assets of the Estate were sufficient to satisfy all claims against the Estate — as required by N.C. Gen. Stat. § 28A-15-10 — before deciding whether Plaintiffs were entitled to recover any or all of the funds contained in the Joint Checking Account. Accordingly, we conclude that the trial court's failure to instruct the jury on this issue constituted prejudicial error and likewise requires a new trial.

Conclusion

For the reasons stated above, we hold that the trial court did not err in denying Defendants' motion for a directed verdict. However, we conclude that the trial court committed prejudicial error in its instructions to the jury. Therefore, we remand this matter for a new trial.

NEW TRIAL.

Judges CALABRIA and STROUD concur.

GRE PROPS. THOMASVILLE LLC v. LIBERTYWOOD NURSING CTR., INC.

[235 N.C. App. 266 (2014)]

GRE PROPERTIES THOMASVILLE LLC, PLAINTIFF-APPELLEE

v.

LIBERTYWOOD NURSING CENTER, INC., DEFENDANT-APPELLANT

NO. COA13-1180

Filed 5 August 2014

1. Landlord and Tenant—summary ejectment—jury instructions

The trial court did not err in denying defendant's request to add a special jury instruction on materiality in a summary ejectment case involving a nursing home. The pattern jury instruction, as applied in this case, sufficiently addressed the required elements for summary ejectment under North Carolina law. Assuming the trial court erred by failing to issue defendant's requested instruction on materiality, defendant was not prejudiced.

2. Appeal and Error—preservation of issues—supporting authority—not sufficient

Plaintiff's argument concerning defendant's attempt to call plaintiff's counsel to testify at trial was deemed abandoned where the sole citation to authority in plaintiff's brief was for the standard of review. Furthermore, there must be compelling reasons for a court to permit a lawyer for a party to testify; the trial court here did not abuse its discretion by denying defendant's request to call plaintiff's counsel to testify concerning the competency and preparation of their witness.

Appeal by defendant from judgment entered 28 December 2012 by Judge April C. Wood in Davidson County District Court. Cross-appeal by plaintiff from order entered 28 January 2013 by Judge Mary F. Covington in Davidson County District Court. Heard in the Court of Appeals 19 March 2014.

Robinson Bradshaw & Hinson, P.A., by Julian H. Wright, Jr., and Cary B. Davis, and Barnes, Grimes, Bunce & Fraley, PLLC, by D. Linwood Bunce, II, for plaintiff-appellee and cross-appellant.

Nexsen Pruet, PLLC, by David S. Pokela, for defendant-appellant and cross-appellee.

McCULLOUGH, Judge.

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Libertywood Nursing Center, Inc. (“defendant”), appeals from the judgment in favor of GRE Properties Thomasville LLC (“plaintiff”) in this summary ejectment action. Plaintiff cross-appeals from the order denying its motion for summary judgment. For the following reasons, we find no error.

I. Background

This case arises out of plaintiff’s lease of a premises located at 1028 Blair Street in Thomasville, North Carolina, to defendant for the operation of a nursing home. The lease, dated 25 August 2000 and executed by plaintiff’s predecessor in interest, Ganot Corporation, and defendant, provided for an initial ten year term commencing 1 October 2000 with options for defendant to extend the lease for two additional five year terms.

Particularly relevant to this appeal, the lease contained the following provisions:

SECTION 5.5 Waste Lessee shall not commit, or suffer to be committed, any waste on the Leased Premises nor shall Lessee maintain, commit or permit the maintenance or commission of any nuisance on the Leased Premises or use the Leased Premises for any unlawful purpose. For purposes of the Article 5.5 “waste” as used herein includes, but is not limited to, loss, or serious and imminent threat of loss as reasonably determined in good faith by Lessor, Regarding: (i) the license to operate the leased premises as a nursing home; (ii) any certificate of need rights; or (iii) any other governmental license or certification material to the operation of the Leased Premises as a nursing home, including but not limited to, certification for participation in the Medicare and/or Medicaid Programs under Titles XVIII and XIX of the Social Security Act, as amended. . . .

SECTION 8.1 Lessee assumes the full and sole responsibility for the condition, furnishing, operation, repair and maintenance of the Demised Premises and every portion thereof from and after the Commencement Date of the Term of this Lease and (except as expressly set forth in Section 2.1) Lessor shall not under any circumstances be responsible for the performance of any repairs, replacements, changes or alterations whatsoever or the furnishing of any services in or to the Demised Premises or the Buildings and Lessor shall not be liable for the

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cost thereof. Lessee and Lessor agree that, throughout the Term of this Lease, Lessee, at Lessee's sole cost and expense, shall maintain and repair the Demised Premises, the Buildings, and the sidewalks and curbs adjacent or appurtenant thereto, and shall keep or cause the same to be maintained in good order and condition, and promptly at Lessee's own cost and expense, make all necessary repairs, replacements thereto, interior and exterior, structural and non-structural, ordinary as well as extraordinary, foreseen as well as unforeseen, and shall keep and maintain all portions of the Demised Premises and the Buildings and the sidewalks adjoining the same in a clean and orderly condition, free of accumulation of dirt, rubbish, snow and ice. When used in this Article VIII or in Article IX, the Term "repairs" shall include all necessary replacements, renewals, alterations, additions and betterments. All repairs made by Lessee shall be at least equal in quality and class to the original work. The necessity for and adequacy of repairs to the Buildings pursuant to this Section 8.1 shall be measured by the standard which is appropriate for buildings of similar construction, use, class and location, provided that Lessee shall in any event make all repairs necessary to avoid any structural damage or injury thereto.

SECTION 19.1 If during the Term of this Lease Lessee shall:

....

(c) default in fulfilling any of the covenants of this Lease (other than the covenants for the payment of Basic Rent, additional rent and other charges payable by Lessee hereunder), and Lessee shall not within twenty (20) days after the giving to Lessee by Lessor of written notice of such default, have cured such default (or, in the case of default which cannot with due diligence be cured by Lessee within such twenty (20) day period, then provided Lessee in good faith commences such curing within said twenty (20) day period, within such extended period as may be necessary to complete the curing of same with all due diligence); . . .

....

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Lessor, at its option, may give to Lessee a notice of intention to Terminate this Lease, effective as of the date of the occurrence of an Event of Default, whereupon this Lease and all right, title and interest of Lessee hereunder shall Terminate as fully and completely as if that day were the date herein specifically fixed for the expiration of the Term, and Lessee will then quit and surrender the Demised Premises to Lessor, but Lessee shall remain liable as hereinafter provided.

When defendant took possession of the premises, it did so “as is” with the roof in poor condition and in need of repair. As leaks occurred, defendant would repair them. However, in 2009 defendant began receiving complaints from plaintiff about the condition of the premises. Specifically, on 19 November 2009, defendant received a letter from plaintiff requesting defendant provide a plan to address alleged violations of Article VIII of the lease. These alleged violations included “a number of roof leaks” and “moisture in the walls” that could “develop into serious damage to the building[,]” “deficiencies noted in recent surveys[,]” repairs needed to the parking and roadway, and repairs to the brick veneer. Defendant then received a follow-up letter from plaintiff on 10 December 2009 that noted the dreadful condition of the premises. In the second letter, plaintiff stated the following:

Within thirty days the roof must be renewed as well as the gutters and downspouts.

All asphalt must be renewed in thirty days. Also a suitable scheduled replacement of all the worn-out furnishings must be approved.

You must diligently tend to a possible mold problem. Brick mortar must be replaced where required as does caulking around windows and doors.

To end the letter, plaintiff noted it “look[ed] forward to [defendant’s] response before January 10, 2010.”

On 2 February 2010, counsel for plaintiff sent defendant a notice of default. The notice also informed defendant of an inspection and offered defendant the opportunity to submit and implement a plan to cure the defaults and bring the premises into compliance with the terms of the lease. On 23 February 2010, defendant gave notice to plaintiff of its intent to extend the lease for an additional five year term and, on 18 March 2009, responded through counsel to plaintiff’s 2 February 2010

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notice of default. In defendant's response, defendant denied it was in default of the lease.

By letter dated 1 April 2010, plaintiff terminated the lease and demanded that defendant immediately vacate the premises.

When defendant did not vacate the premises, plaintiff initiated this summary ejectment action to remove defendant from the premises. Plaintiff filed its Complaint in Summary Ejectment in Davidson County Small Claims Court on 14 April 2010. Following a hearing, the magistrate entered a Judgment in Action for Summary Ejectment in favor of plaintiff on 22 April 2010. Defendant appealed that judgment to District Court.

Once in District Court, defendant filed an Answer & Counterclaim on 14 May 2010 to which plaintiff replied on 11 June 2010.

Following a period of discovery, on 11 July 2012, plaintiff moved for summary judgment. In both the motion and a brief filed in support of the motion, plaintiff argued defendant was in default of Section 5.3 of the lease when it gave notice of its intention to exercise the renewal option on 23 February 2010. Thus, plaintiff argued the notice was void and without effect, resulting in the expiration of the lease at the end of the initial 10 year term on 31 October 2010. On 29 August 2012, plaintiff's motion for summary judgment came on for hearing in Davidson County District Court before the Honorable Mary F. Covington, who announced her decision to deny the motion at the conclusion of the hearing.

By Notice of Voluntary Dismissal filed 20 November 2012, defendant dismissed its counter-claim against plaintiff.

On 26 November 2012, the case came on for a pre-trial hearing, during which the court considered a motion in limine by plaintiff to strike the deposition testimony of Mr. John M. Underwood, a former employee of plaintiff's parent company who was deposed in both his individual capacity and as plaintiff's corporate designee pursuant to N.C. Gen. Stat. § 1A-1, Rule 30(b)(6). At the conclusion of the hearing, the trial court denied plaintiff's motion in limine and entered a Final Order on Pre-trial Conference.

The following day, 27 November 2012, the case was called for jury trial in Davidson County District Court, the Honorable April C. Wood, Judge presiding.

At the conclusion of the trial on 12 December 2012, the jury returned verdicts in favor of plaintiff finding: (1) defendant violated provisions of

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the lease and failed to cure those violations after being provided written notice and an opportunity to cure; and (2) plaintiff did not waive defendant's defaults. The trial court then entered judgment for plaintiff ordering defendant be removed from and plaintiff be put in possession of the premises.

On 4 January 2013, defendant filed post-trial motions for judgment notwithstanding the verdict and, alternatively, a new trial. Those motions were denied by order of the trial court filed 18 January 2013. An additional order memorializing the prior denial of plaintiff's 11 July 2012 motion for summary judgment was subsequently filed on 28 January 2013.

Defendant filed Notice of Appeal on 8 February 2013. Plaintiff filed Notice of Cross-Appeal shortly thereafter on 13 February 2013.

II. Discussion

On appeal, defendant contends the trial court erred in (1) failing to instruct the jury that a breach of a commercial lease must be material to warrant forfeiture of the lease and ejection; and (2) denying it the right to call plaintiff's counsel as witnesses at trial. On cross-appeal, plaintiff contends the trial court erred in denying its motion for summary judgment prior to the jury trial. We address these issues in order.

Jury Instruction

[1] During the charge conference, the parties agreed that the trial judge should instruct the jury pursuant to N.C.P.I.—Civil 845.00, the pattern instruction for summary ejection when there has been a violation of a provision in a lease. Defendant, however, proposed that the trial judge add the following instruction on materiality to the pattern instruction:

Fifth, that [d]efendant's default under Section 19.1(c), Section 8.1 and/or Section 5.5 of the Lease was so material that it justified a termination of the Lease[.]

Upon considering defendant's request, the trial judge declined to include the special instruction and noted defendant's objection to the omission prior to instructing the jury. The trial judge then proceeded to issue the following instructions to the jury:

The first issue reads, is the landlord, GRE, entitled to possession of the leased premises on the ground tenant, Libertywood, violated provisions of the lease and failed to cure those violations after being provided written notice by GRE and an opportunity to cure.

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On this issue the burden of proof is on GRE. This means that GRE must prove by the greater weight of the evidence several things. First, that Libertywood took possession of the premises under a lease with GRE. A lease is a contract for the exclusive possession of a premises. A lease may be written or verbal. Second, that the parties agreed that as part of the lease tenant, Libertywood, . . . A. [w]ould . . . maintain[] the premises and make all necessary repairs and replacements in accordance with section eight point one (8.1) of the lease, and B. would not permit waste as set forth [in] section five point five (5.5) of the lease.

Third, that the parties agreed that the lease would terminate in the event the tenant, Libertywood, violated – sections eight point one (8.1) or five point five (5.5) of the lease and the[n] failed to cure or commence in good faith to cure the violations within twenty days after receiving written notice from GRE as required by section nineteen point one (19.1) of the lease.

Four, that Libertywood violated sections eight point one (8.1), and five point five (5.5) of the lease an[d] failed to cure or commence in good faith to cure the violations within twenty days after receiving written notice from GRE.

Fifth, that GRE terminated the lease as provided by the lease by giving Libertywood written notice of termination on April the first, two thousand ten (4/1/2010) and Libertywood did not vacate the premises.

Finally, as to this issue on which GRE has the burden of proof, if you find that by the greater weight of the evidence, that the landlord is entitled to possession of the leased premises then it would be your duty to answer this issue yes in favor of GRE. If, on the other hand, you fail to so find then it would be your duty to answer this issue no, in favor of Libertywood.

These instructions closely mirror N.C.P.I.–Civil 845.00 and exclude an instruction on materiality.

Now, on appeal, defendant first argues the trial court erred in failing to issue the requested instruction on materiality.

This Court has recognized a four part test to determine if the trial court erred in refusing to give a requested instruction.

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A specific jury instruction should be given when “(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.”

Outlaw v. Johnson, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002)). In addition, “[f]ailure to give a requested and appropriate jury instruction is reversible error [only] if the requesting party is prejudiced as a result of the omission.” *Id.*

Defendant first contends the law requires breaches of a lease to be material to justify summary ejectment. Thus, in accordance with the test set forth in *Outlaw*, defendant asserts the requested instruction on materiality was a correct statement of the law. In support of its argument, defendant cites this Court’s decision in *Loomis v. Hamerah*, 140 N.C. App. 755, 538 S.E.2d 593 (2000), as well as cases and treatises that are not binding on this Court.

In *Loomis*, this Court reviewed the trial court’s grant of summary judgment in favor of a landlord who brought a summary ejectment action. As this Court explicitly stated in the opinion, the dispositive issue in *Loomis* was “whether there [was] a genuine issue of material fact as to [the d]efendant’s breach of the [l]ease[.]” *Loomis*, 140 N.C. App. at 760, 538 S.E.2d at 596. Upon review, this Court agreed with the tenants and held genuine issues of material fact existed as to whether the tenants breached the lease. *Id.* at 761, 538 S.E.2d at 596-97. As a result, this Court reversed the grant of summary judgment in favor of the landlord and remanded the case to the trial court. *Id.* at 761, 538 S.E.2d at 597.

In citing *Loomis*, defendant relies on the following language that this Court reduced to a footnote:

To the extent there has been a breach of any provision of the [l]ease, not every breach “justifies a cancellation and rescission” of the contract. *Childress v. Trading Post*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957). To justify termination of a lease, the breach “must be so material as in effect to defeat the very terms of the contract.” *Id.* (citations omitted)[.]

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Id. at 761 n.3, 538 S.E.2d at 597 n.3. Upon review of the *Loomis* opinion, it is clear to us that the above footnoted language was merely dicta and unnecessary to the Court's determination that genuine issues of material fact existed as to whether the tenants breached the lease. Thus, the language is not authoritative. Moreover, we note the case cited in the footnote in *Loomis* is not a summary ejectment case resulting from a breach of a lease, but a construction contract case involving alleged breaches of and variations from an agreement between builder and owner. *See Childress*, 247 N.C. at 156, 100 S.E.2d at 395 ("Not every breach of a contract justifies a cancellation and rescission. The breach must be so material as in effect to defeat the very terms of the contract.").

Upon review of *Loomis*, *Childress*, and the other non-binding authorities cited by defendant, we are not persuaded the trial court erred in refusing to issue the requested instruction on materiality.

In North Carolina, "[s]ummary ejectment proceedings are purely statutory[.]" *Marantz Piano Co., Inc. v. Kincaid*, 108 N.C. App. 693, 696, 424 S.E.2d 671, 672 (1993). Among other events, North Carolina's General Statutes allow for summary ejectment "[w]hen the tenant or lessee . . . has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased." N.C. Gen. Stat. § 42-26(a) (2) (2013). "Under [N.C. Gen. Stat. § 42-26(a)(2)], a breach of the lease cannot be made the basis of summary ejectment unless the lease itself provides for termination by such breach or reserves a right of reentry for such breach." *Stanley v. Harvey*, 90 N.C. App. 535, 537, 369 S.E.2d 382, 384 (1988). In the present case, Section 19.1 of the lease provided for termination of the lease upon breach of Sections 5.5 and 8.1.

Upon review of the pattern instructions and the instructions provided in this case, stated above, we hold N.C.P.I.–Civil 845.00, as applied in this case, sufficiently addressed the required elements for summary ejectment under North Carolina law. Therefore, the trial court did not err in denying defendant's request to add a special instruction on materiality.

Moreover, assuming arguendo the trial court erred in failing to issue defendant's requested instruction on materiality, we are not convinced that defendant was prejudiced. The instructions to the jury specifically identified Sections 5.5 and 8.1 as the relevant provisions for deciding whether a breach of the lease occurred. Upon review of the lease, it is clear that Sections 5.5 and 8.1 are not insignificant to the agreement between plaintiff and defendant; thus, we find it unlikely that a breach of either section would be immaterial. Accordingly, even if the requested

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instruction on materiality was a correct statement of North Carolina law, defendant was not prejudiced by the omission and the error does not amount to reversible error.

Counsel as a Witness

[2] As noted in the background, during discovery Mr. Underwood, the former director of construction and development for plaintiff's parent company, was deposed in both his individual capacity and as plaintiff's corporate designee pursuant to N.C. Gen. Stat. § 1A-1, Rule 30(b) (6). Certain portions of Mr. Underwood's testimony were favorable to defendant.

Although plaintiff did not raise concerns about Mr. Underwood's competence during the deposition held in October 2010, months later, after learning Mr. Underwood had been diagnosed with a neurological condition affecting his memory, plaintiff filed a motion in limine pursuant to N.C. Gen. Stat. § 8-81 to exclude his deposition testimony from trial. In support of its motion, plaintiff argued unfair prejudice and lack of personal knowledge under Rules 403 and 602 of the North Carolina Rules of Evidence. Upon considering arguments made during a 26 November 2012 pre-trial hearing, the trial court denied plaintiff's motion in limine.

Thereafter, defendant introduced Mr. Underwood's deposition testimony into evidence at trial and read portions of the testimony to the jury. In response, plaintiff introduced the deposition testimony of Mr. Underwood's neurologist into evidence in order to attack the credibility of Mr. Underwood's deposition testimony. Portions of the deposition testimony by Mr. Underwood's neurologist called Mr. Underwood's memory at the time his deposition was taken into question. Specifically, Mr. Underwood's neurologist stated he believed Mr. Underwood was suffering from mild dementia in October 2010.

In order to rebut plaintiff's assertions that Mr. Underwood was not competent at the time of his deposition, during discussions in chambers, defendant requested it be able to call Julian Wright and Cary Davis, counsel for plaintiff, to testify regarding their preparation of Mr. Underwood for his deposition. The trial judge, however, denied the request in chambers. As a result, defendant was not able to question plaintiff's counsel on Mr. Underwood's competence. Defendant did, however, attempt to make an offer of proof to preserve its right to appeal.

Now, on appeal, defendant argues the trial court erred in denying its request to call plaintiff's counsel as witnesses of Mr. Underwood's

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competence in order to bolster Mr. Underwood's deposition testimony. Yet, defendant cites only *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010), for the proposition that issues of relevance are reviewed *de novo* and fails to cite any further legal authority in support of its argument. As a result, we find defendant has abandoned this argument. See N.C. R. App. P. 28(b)(6) (2014) ("*The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies.*") (emphasis added).

Although defendant's argument is abandoned, we take this opportunity to note

[t]here is . . . a natural reluctance to allow attorneys to appear in a case as both advocate and witness. Therefore, the decision of whether to permit [it] is within the discretion of the trial court. The circumstances under which a court will permit a lawyer for a party . . . to take the witness stand must be such that a compelling reason for such action exists.

State v. Simpson, 314 N.C. 359, 373, 334 S.E.2d 53, 62 (1985) (citations omitted).

Where other witnesses could testify to Mr. Underwood's competence, the trial court did not abuse its discretion in denying defendant's request to call plaintiff's counsel as a witness.

Directed Verdict

In addition to responding to defendant's arguments on appeal, plaintiff asserts, as an alternative basis in the law supporting the judgment, that the trial court erred in denying its motion for a directed verdict. Because we find no error in the trial below, we do not address plaintiff's alternative argument.

Summary Judgment

In the event we reversed the judgment based on the jury's verdict, plaintiff filed a cross-appeal contending the trial court erred in denying its motion for summary judgment. Because the judgment based on the jury's verdict stands, we do not address plaintiff's cross-appeal. Furthermore, an appeal of a denial of summary judgment is ordinarily not reviewable on appeal from a final judgment rendered in a trial on the merits. See *Harris v. Walden*, 314 N.C. 284, 286-87, 333 S.E.2d 254, 256 (1985).

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III. Conclusion

For the reasons discussed, we find no error in the trial below.

No error.

Judges ELMORE and DAVIS concur.

MARGARITA BELILA HOLBERT, PLAINTIFF

v.

LARRY R. HOLBERT, DEFENDANT

No. COA13-951

Filed 5 August 2014

Appeal and Error—interlocutory orders and appeals—dismissal

Defendant's appeal from interlocutory orders denying his motion for summary judgment directed to plaintiff's equitable distribution claim and granting plaintiff's motion for summary judgment with respect to one of the grounds upon which defendant sought to challenge the validity of her equitable distribution claim was dismissed.

Appeal by defendant from orders entered 18 March 2013 and 4 June 2013 by Judge Peter Knight in Henderson County District Court. Heard in the Court of Appeals 6 January 2014.

Prince, Youngblood & Massagee, PLLC, by Boyd B. Massagee, Jr., for Plaintiff-Appellee.

F.B. Jackson & Associates Law Firm, PLLC, by Frank B. Jackson and Angela S. Beeker, for Defendant-Appellant.

ERVIN, Judge.

Defendant Larry R. Holbert appeals from orders denying his motion for summary judgment directed to Plaintiff's equitable distribution claim and granting Plaintiff's motion for summary judgment with respect to one of the grounds upon which Defendant sought to challenge the validity of her equitable distribution claim, with the relevant issue being the validity of Defendant's contention that his marriage to Plaintiff Margarita Belila Holbert had been performed by an individual who was not authorized

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to perform marriage ceremonies and the extent to which the trial court was precluded from considering that contention on the merits in light of an earlier consent judgment, and denying Defendant's motion for relief from that earlier consent judgment predicated on the theory that the consent judgment failed to accurately reflect the agreement between the parties that it was supposed to memorialize. After careful consideration of Defendant's challenges to the trial court's orders in light of the record and the applicable law, we conclude that Defendant's appeal should be dismissed as having been taken from unappealable interlocutory orders.

I. Factual BackgroundA. Substantive Facts

Plaintiff came to the United States from the Philippines on or about 10 December 2000 as Defendant's fiancée. The parties were married on 9 February 2001 by an individual named Earl R. Jones, who was selected to perform that role by Defendant. Although he was "licensed in the Gospel Ministry" at the time that he conducted the parties' marriage ceremony, Mr. Jones had not been "ordained" by the church with which he was affiliated at that time. Mr. Jones was, however, "ordained" on 30 March 2008.

After the performance of the marriage ceremony, Plaintiff and Defendant held themselves out to be husband and wife. The parties' relationship began to deteriorate when Defendant began to curse Plaintiff, state that it would have been cheaper to have her killed, and offer to pay others to marry her. At approximately the time that the parties separated on 16 September 2009, Defendant locked Plaintiff out of the marital residence and changed all of the locks.

B. Procedural Facts

On 6 October 2009, Plaintiff filed a complaint in which she claimed that she had been abandoned by Defendant and sought a divorce from bed and board, post-separation support, alimony, equitable distribution, and an award of attorney's fees. On 20 October 2009, Defendant filed a motion seeking to have Plaintiff's complaint dismissed in reliance upon the parties' premarital agreements and to enforce the provisions of their premarital agreements. On 6 April 2010, the parties filed a memorandum of decision in which Defendant "waive[d] any defense to any cause of action set out in the complaint on the basis of any premarital agreement" and "any defense by virtue of any other premarital agreement not identified in his answer." In return for this commitment and the payment of \$50,000, Plaintiff waived all of the claims that she had asserted against

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Defendant except for the right to have marital and divisible property equitably distributed. As part of this process, the parties agreed that it would be unnecessary for their signatures to appear on the formal consent judgment. On 6 May 2010, Judge Athena Fox Brooks entered a consent judgment that provided, in pertinent part, that “[b]oth parties agree that [Plaintiff] is entitled to proceed with her claim of equitable distribution against [Defendant] without any defense thereto”; that Defendant’s dismissal motion should be denied; and that the only issue remaining between the parties involved the equitable distribution of their marital and divisible property.¹

On 6 October 2010, Defendant filed a complaint in a separate action seeking an absolute divorce. On 23 November 2010, the court granted Defendant an absolute divorce.

On 4 February 2011, Defendant filed a motion seeking to have the 6 April 2010 memorandum of decision and the 6 May 2010 consent judgment set aside pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), (4) and (6). In support of this request, Defendant contended that he had entered into the agreement memorialized in these documents at a time when his cognition was impaired and that he had been unable to understand the contents of the 6 April 2010 memorandum of decision when he signed it. On 11 May 2011 and 8 June 2011, respectively, the trial court entered an order and an amended order denying Defendant’s motion on the grounds that he was presumed to be competent when he consented to the agreement memorialized in the 6 April 2010 memorandum of decision and the 6 May 2010 consent judgment and that he had failed to present substantial evidence tending to show that he was incompetent at the time that he entered into this agreement.

On 11 October 2012, Defendant, who was now represented by new legal counsel, filed an answer and counterclaim in which he asserted, among other things, that he was entitled to rely on the provisions of the parties’ premarital agreement as a defense to Plaintiff’s equitable distribution claim, with this assertion resting upon his recent discovery that Mr. Jones was not authorized to conduct marriage ceremonies under North Carolina law, and that he was entitled to have his marriage to Plaintiff annulled, with this assertion resting on a contention that Mr. Jones had not been legally authorized to perform their marriage ceremony and that the parties had never consummated their marriage. In

1. The 6 May 2010 consent judgment also memorialized an agreement between the parties under which Plaintiff agreed to dismiss a domestic violence proceeding that she had initiated against Defendant.

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addition, Defendant filed a motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) in the action in which he had been divorced from Plaintiff on 16 October 2012 in which he alleged that he had recently learned that Mr. Jones had not been authorized to conduct the parties' marriage ceremony. On 8 November 2012, Plaintiff filed a response to Defendant's filings in the equitable distribution and divorce proceedings in which she asserted a number of affirmative defenses to Defendant's contentions, including, but not limited to, ratification, collateral estoppel, judicial estoppel, waiver, fraud, and statute of limitations.

On 3 December 2012, Defendant filed a motion seeking the entry of summary judgment in his favor with respect to Plaintiff's equitable distribution claim on the grounds that there "was no valid marriage between the parties" given the fact that Mr. Jones had not been "ordained" at the time of the parties' marriage ceremony. On 6 February 2013, Plaintiff moved for partial summary judgment with respect to the issue of whether (1) the parties' premarital agreements barred her equitable distribution claim; (2) Plaintiff had waived her right to assert an equitable distribution claim by executing the parties' premarital agreements, (3) Plaintiff was estopped by the parties' premarital agreements from asserting an equitable distribution claim, (4) the fact that Plaintiff took a salary from Defendant barred her from asserting an equitable distribution claim, and (5) Plaintiff had misappropriated money from Defendant. After a hearing held on 18 February 2013, the trial court entered an order on 18 March 2013 granting Plaintiff's partial summary judgment motion and specifically determining, among other things, that Defendant was barred from asserting the parties' premarital agreement as a defense to Plaintiff's equitable distribution claim by the 6 April 2010 memorandum of decision and 6 May 2010 consent judgment. In addition, the trial court entered another order on the same date denying Defendant's request for an annulment of his marriage to Plaintiff given that he had elected the remedy of absolute divorce rather than annulment with full knowledge of the facts underlying his contention that the parties' marriage had never been consummated; denying Defendant's request for the entry of summary judgment in his favor with respect to Plaintiff's equitable distribution claim on the grounds that the record reflected the existence of genuine issues of material facts concerning the extent to which Mr. Jones had the authority to conduct the parties' wedding ceremony; and granting summary judgment in favor of Plaintiff with respect to the issue of whether Defendant was entitled to assert any defense, including the invalidity of the parties' marriage, in opposition to Plaintiff's equitable distribution claim given the provisions of

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the 6 April 2010 memorandum of decision and the 6 May 2010 consent judgment. Defendant noted an appeal to this Court from the second 18 March 2013 order on 17 April 2013.

On 16 April 2013, Defendant filed a motion for relief from the 6 May 2010 consent judgment and the second 18 March 2013 order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) and (4), or, in the alternative, for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, with both requests for relief predicated on the theory that the language concerning Defendant's waiver of the right to assert any defenses to Plaintiff's equitable distribution claim contained in the 6 May 2010 order was inconsistent with the equivalent provision of the 6 April 2010 memorandum of decision and that this inconsistency between the relevant provisions of the two documents indicated that Judge Brooks lacked jurisdiction to enter the 6 May 2013 order to the extent that it precluded him from asserting any defense to Plaintiff's equitable distribution claim. On 4 June 2013, the trial court entered an order denying Defendant's motion, finding that Defendant's motions were "closely related to the Motions previously heard by the undersigned and certified for immediate review by the Court of Appeals," that there was a "need for a determination of these issues prior to an Equitable Distribution Trial," and that "the undersigned respectfully certifies to the Court of Appeals that there are no just reasons for delay in reviewing these orders." On 5 June 2013, the trial court entered a certification stating that it deemed "it appropriate that the orders entered by him" on 18 March 2013 "be reviewed by the North Carolina Court of Appeals, and further respectfully certifies to the North Carolina Court of Appeals that there is no just reason for delay in so reviewing these orders."² On 5 June 2013, Defendant noted an appeal to this Court from the 4 June 2013 order.

2. We note, in passing, that Defendant never noted an appeal from the first 18 March 2013 order, that the trial court certified the 18 March 2013 orders almost two months after Defendant noted an appeal to this Court from the second 18 March 2013 order, and that the trial court's signature on the attempted certification of the 18 March 2013 orders antedates the date upon which the certification was file-stamped by three days. However, given that Defendant has not advanced any substantive challenge to the validity of the first 18 March 2013 order, that Defendant's failure to advance any arguments in his brief challenging the validity of a particular order precludes us from assessing its validity on appeal, *State v. Garcell*, 363 N.C. 10, 70, 678 S.E.2d 618, 655 (citing N.C. R. App. P. 28(b)(6) and *State v. Raines*, 362 N.C. 1, 26, 653 S.E.2d 126, 142 (2007), *cert. denied*, 557 U.S. 934, 129 S. Ct. 2857, 174 L. Ed. 2d 601 (2009)), *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009), and that the trial court's attempt to certify the second 18 March 2013 order for immediate review is ineffective for other reasons, we need not comment on the validity of the trial court's attempt to certify the first 18 March 2013 order for immediate review.

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II. Substantive Legal AnalysisA. General Principles of Appellate Jurisdiction

As an initial matter, we must address the extent to which this Court has jurisdiction over Defendant's challenges to the second 18 March 2013 and the 4 June 2013 orders. Although Defendant acknowledges that both of the orders that he wishes to challenge on appeal are interlocutory, he contends that both orders are covered by exceptions to the general rule precluding appellate review of interlocutory orders. We are not persuaded by Defendant's arguments.

"An order is either 'interlocutory or the final determination of the rights of the parties.' 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.'" *Harbour Point Homeowners' Ass'n v. DJF Enters., Inc.*, 206 N.C. App. 152, 156, 697 S.E.2d 439, 443 (2010) (internal quotation marks and citations omitted) (quoting N.C. Gen. Stat. § 1A-1, Rule 54(a), and *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). "Ordinarily, an appeal will lie only from a final judgment." *Steele v. Moore-Flesher Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963). However, interlocutory orders are appealable under certain circumstances. For example, a party is allowed to take an appeal from an interlocutory order that "affects a substantial right claimed in any action or proceeding," N.C. Gen. Stat. § 1-277(a); *see also* N.C. Gen. Stat. § 7A-27(b)(3)(a), with the extent to which an interlocutory order affects a substantial right requiring "consideration of 'the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.'" *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). In addition, N.C. Gen. Stat. § 1A-1, Rule 54(b) provides that a "court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment," which "shall then be subject to review by appeal or as otherwise provided by these rules or other statutes." However, the fact "[t]hat the trial court declared [an order] to be a final [order for purposes of N.C. Gen. Stat. § 1A-1, Rule 54(b)] does not make it so," *Tridyn Indus. V. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979), with any certification of an order that is not a final judgment as to a claim or party being ineffective. *Anderson v. Atl. Cas. Ins. Co.*, 134 N.C. App. 724, 726, 518 S.E.2d 786, 788 (1999). "Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's

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acceptance of an interlocutory appeal and our Court's responsibility to review those grounds." *Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)). As a result, given Defendant's concession that the orders that he seeks to challenge on appeal are interlocutory in nature, we must now consider the extent to which either of these orders are properly before us for review at this time.³

B. Analysis of Appealability of Specific Orders**1. Second 18 March 2013 Order**

Although the trial court addressed a number of issues in the second 18 March 2013 order, the only portion of that order that Defendant seeks to challenge on appeal at this time is the trial court's decision to grant summary judgment in Plaintiff's favor on the grounds that Defendant waived the right to assert any defenses to Plaintiff's equitable distribution claim in the 6 April 2010 memorandum of decision and the 6 May 2010 consent order. According to Defendant, the trial court's decision to preclude him from asserting any defenses to Plaintiff's equitable distribution claim affects a substantial right.

As an initial matter, Defendant argues, in reliance upon the Supreme Court's decision in *Mercer v. Hilliard*, 249 N.C. 725, 107 S.E.2d 554 (1959), that an order overruling a plea in bar is immediately appealable on substantial right grounds. In *Mercer*, the defendants asserted *res judicata* as a bar to the plaintiff's personal injury claim. *Id.* at 726-27, 107 S.E.2d at 555. However, the trial judge allowed the plaintiff's demurrer to the defendants' *res judicata* defense. *Id.* at 727, 107 S.E.2d at 555. After stating that "[a] plea in bar is one that denies the plaintiff's right to maintain the action, and which, if established, will destroy the action," *id.* at 728, 107 S.E.2d at 556 (quoting McIntosh, N.C. Practice & Procedure, § 523 (1929)) (citing *Brown v. E.H. Clement Co.*, 217 N.C. 47, 51, 6 S.E.2d 842, 845 (1940), and *Solon Lodge Knights of Pythias Co. v. Ionic Lodge Free Ancient & Accepted Masons*, 245 N.C. 281, 287, 95 S.E.2d 921, 925 (1957)), the Supreme Court stated that "[a]n order or judgment which sustains a demurrer to a plea in bar affects a substantial right and a defendant may appeal therefrom." *Id.* (citing N.C. Gen. Stat. § 1-277 and

3. As a result of the fact that Defendant noted his appeals from the second 18 March 2013 and 4 June 2013 orders prior to 23 August 2013 and the fact that neither of the orders that Defendant wishes to challenge on appeal represent a final adjudication of Plaintiff's equitable distribution claim, the provisions of N.C. Gen. Stat. § 50-19.1 do not apply in this instance.

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Shelby v. Charlotte Elec. Rwy., Light, and Power Co., 147 N.C. 537, 538, 61 S.E. 377, 378 (1908)). In other words, Defendant contends that any decision to reject a defense that would defeat a claim constitutes a plea in bar and that any order embodying such a decision is immediately appealable on substantial right grounds. We do not find Defendant's argument persuasive given the facts before us in this case.

The concept of a plea in bar arose under and existed in civil procedure systems that antedated the current North Carolina Rules of Civil Procedure.

What then is a plea in bar? The word "bar" has a peculiar and appropriate meaning in law. In a legal sense it is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action, a special plea constituting a sufficient answer to an action at law, and so called because it barred—i.e., prevented—the plaintiff from further prosecuting it with effect, and, if established by proof, defeated and destroyed the action altogether.

Murchison Nat'l Bank v. Evans, 191 N.C. 535, 538, 132 S.E. 563, 564 (1926). According to the Supreme Court:

the following pleas have been held to be pleas in bar: (1) Statute of Limitations. *Oldham v. Rieger*, 145 N.C. 254, [58 S.E. 1091 [1907]. (2) Account stated. *Kerr v. Hicks*, 129 N.C. 141[, 39 S.E. 197 (1901)]; [*Kerr v. Hicks*,] 131 N.C. 90[, 42 S.E. 532 (1902)]; *Jones v. Wooten*, 137 N.C. [421, 49 S.E. 915 (1905)]. (3) Failure to comply with the provisions of a contract which are conditions precedent to liability. *Bank [of Tarboro] v. Fidelity [& Deposit] Co.*, 126 N.C. [320, 35 S.E. 588 (1900)]. (4) Plea of sole seizin by reason of adverse possession of twenty years against a tenant in common. But [a] plea of sole seizin which by its very terms involves an accounting, is not a good plea. *Duckworth v. Duckworth*, 144 N.C. 620[, 57 S.E. 396 (1907)]. (5) Release. *McAuley v. Sloan*, 173 N.C. [80, 91 S.E. 701 (1917)]. (6) Accord and satisfaction. *McAuley v. Sloan*, 173 N.C. [80, 91 S.E. 701 (1917)]. (7) Estoppel by judgment. *Jones v. Beaman*, 117 N.C. [259, 23 S.E. 248 (1895)].

Id.; see also in *Mercer*, 249 N.C. at 727-28, 107 S.E.2d at 555-56 (describing the assertion of a *res judicata* defense as a plea in bar). In view of the fact that a successful plea in bar barred an action from moving forward, *Scott Poultry Co. v. Bryan*, 272 N.C. 16, 19, 157 S.E.2d 693,

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696 (1967) (stating that “[t]he effect of a plea in bar is to destroy plaintiff’s action”), such pleas played a role in earlier systems of civil procedure similar to that currently filled by affirmative defenses as that term is used in the North Carolina Rules of Civil Procedure.⁴ In apparent recognition of that fact, certain decisions of this Court handed down within the first decade after the enactment of the North Carolina Rules of Civil Procedure continued to make references to “pleas in bar” even though that expression does not appear in N.C. Gen. Stat. § 1A-1, Rule 8. *Taylor v. Bailey*, 49 N.C. App. 216, 217, 271 S.E.2d 296, 297 (1980) (treating the affirmative defense of election of remedies as a plea in bar), *appeal dismissed*, 301 N.C. 726, 274 S.E.2d 235 (1981); *T. A. Loving Co. v. Latham*, 20 N.C. App. 318, 319, 201 S.E.2d 516, 517 (1974) (stating that the “[d]efendants filed answer which contained a number of affirmative defenses constituting pleas in bar”); *McKinney v. Morrow*, 18 N.C. App. 282, 283, 196 S.E.2d 585, 586 (noting that the defendant was allowed to “amend his answer to plead that release as an affirmative defense in bar”), *cert. denied*, 283 N.C. 655, 197 S.E.2d 874 (1973). As a result, a plea in bar, like an affirmative defense, represented something that the defendant in a civil action was required to plead and prove. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 560, 253 S.E.2d 277, 279 (1979) (citing N.C. Gen. Stat. § 1A-1, Rule 8(c); *Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E.2d 178, 180 (1974)) (stating that “[a] defense based on waiver or release is an affirmative defense and, therefore, the defendant bears the burden of proof”).

Assuming, without in any way deciding, that the legal principle affording any party asserting a plea in bar against which a demurrer has been sustained the right to seek immediate appellate relief has survived the enactment of the North Carolina Rules of Appellate Procedure,⁵ we do not believe that the principle upon which Defendant relies has any application in this case. As a general proposition, “a defense which

4. However, as should be obvious from an examination of the list of pleas in bar set out in *Murchison National Bank* and the non-exclusive list of affirmative defenses set out in N.C. Gen. Stat. § 1A-1, Rule 8(c) (listing “accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense” as affirmative defenses), pleas in bar are a subset of, rather than completely equivalent to, modern affirmative defenses.

5. As we read the applicable decisional law, there is substantial basis for questioning whether the principle upon which Defendant relies remains universally valid with respect to all defenses that were formerly treated as pleas in bar. *E.g.*, *Thompson v. Norfolk & S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401, (2000) (holding that “an order denying a party’s motion to dismiss based on a statute of limitation does not effect a substantial right and is therefore not appealable”).

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contests one of the material allegations of the complaint is not an affirmative defense since it involves an element of the plaintiff's prima facie case.'” *Wallace v. Haserick*, 105 N.C. App. 315, 319, 412 S.E.2d 694, 695, *disc. review denied*, 331 N.C. 291, 417 S.E.2d 71 (1992) (quoting Shuford, North Carolina Civil Practice and Procedure, § 8-7 (1988)). The argument that Defendant was precluded from asserting by virtue of the trial court's decision to grant summary judgment in Plaintiff's favor in the second 18 March 2013 order involves, in essence, a denial that the parties were ever legally married. As a general proposition, a party to a void marriage does not have the rights available to a person who has entered into a valid marriage. *Taylor v. Taylor*, 321 N.C. 244, 249, 362 S.E.2d 542, 545-46 (1987) (holding that a “bigamous marriage is a nullity, with no legal rights flowing from it”). For that reason, the statutory provisions governing equitable distribution actions assume that the only persons entitled to obtain an equitable distribution of marital and divisible property are the parties to a valid marriage. Thus, rather than constituting a plea in bar or even an affirmative defense, the contention that the trial court precluded Defendant from asserting in the second 18 March 2013 order amounted to the denial that an element of Plaintiff's equitable distribution claim ever existed. As a result, since the argument that Defendant has been precluded from making does not constitute an affirmative defense, much less a plea in bar, Defendant is not entitled to an immediate appeal from the second 18 March 2013 order based on the principle set out in *Mercer*.

Secondly, Defendant argues that the second 18 March 2013 order affects a substantial right by creating a risk that inconsistent judgments would be reached in the trial court. According to Defendant, Plaintiff's equitable distribution claim and his counterclaim for an annulment based on Mr. Jones' lack of authority to perform the parties' marriage ceremony are “so intertwined that an adjudication of [his] counterclaim could determine the outcome of [her] claim[.]”⁶ In support of this assertion, Defendant relies on our decision in *Bartlett v. Jacobs*, 124 N.C. App. 521, 524, 477 S.E.2d 693, 695-96 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 161 (1997), in which we allowed an interlocutory appeal from an order granting summary judgment in favor of the defendant with respect to the plaintiff's negligence claim even though the defendant's claim for unpaid fees resulting from the provision of his

6. Defendant has not asserted in his brief any other basis for challenging the validity of his marriage, such as his contention that the parties never consummated their marriage, aside from his contention that Mr. Jones lacked the authority to perform their marriage ceremony, so we limit the discussion in the text of this opinion to the contention that Defendant has actually made.

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services remained undecided “[b]ecause the possibility of inconsistent verdicts from two trials on the same issues exist[ed]” in cases in which “‘there are overlapping factual issues between the claim determined and any claims which have not yet been determined because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues.’” (internal quotation marks omitted) (quoting *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993)).

Although the legal principle upon which Defendant relies in support of the second of his “substantial right” contentions relating to the second 18 March 2013 order is certainly a valid one, it has no application in this instance. In essence, Defendant’s argument rests on the assumption that his counterclaim for annulment was fully resolved in the second 18 March 2013 order. However, the second 18 March 2013 order did not in any way determine that Defendant’s annulment claim lacked validity. In fact, the trial court determined that there were genuine issues of material fact concerning the extent to which Mr. Jones was authorized to conduct the parties’ marriage ceremony. Instead, the relevant provision of the second 18 March 2013 order simply precludes Defendant from asserting the same facts upon which his annulment claim rests in response to Plaintiff’s equitable distribution claim. As a result, since the ruling with respect to Defendant’s contention that his marriage to Plaintiff was not valid embodied in the second 18 March 2013 order is not inconsistent with Defendant’s assertion that he has the right to have his marriage annulled based on Mr. Jones’ lack of authority to conduct their marriage ceremony, Defendant is not entitled to immediate appellate review of the second 18 March 2013 order on substantial right grounds.

Finally, Defendant contends that, even if the second 18 March 2103 order did not affect a substantial right, that order was appealable pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). However, Defendant has failed to identify any claim with respect to which the trial court made a final decision in the second 18 March 2013 order. For example, the record clearly establishes that the trial court has not finally decided the merits of Plaintiff’s equitable distribution claim. Although Defendant contends that the second 18 March 2013 order “represent[s] a final order on Defendant’s counterclaim for annulment,” that contention is clearly without merit given that the trial court has never made a determination concerning the merits of Defendant’s annulment claim and, in fact, held that the record disclosed the existence of genuine issues of material fact concerning the extent to which Mr. Jones had the authority to marry Plaintiff and Defendant. As we have already noted, the trial court simply held that Defendant had waived the right to assert those facts in

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opposition to Plaintiff's equitable distribution claim in light of the 6 April 2010 memorandum of decision and the 6 May 2010 consent judgment. Thus, the trial court lacked the authority to certify the second 18 March 2013 order for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). As a result, since Defendant has not established that he is entitled to immediate appellate review of the second 18 March 2013 order on any basis, we have no authority to reach the merits of Defendant's challenge to the trial court decisions embodied in that order and must, instead, dismiss Defendant's attempted appeal from that order.

2. 4 June 2013 Order

According to Defendant, the 4 June 2013 order is subject to immediate appeal despite its interlocutory status on a number of grounds. More specifically, Defendant contends that he is entitled to an immediate appeal from the 4 June 2013 order on the grounds that the order in question rejects a plea in bar, creates a risk of inconsistent judgments, and has been certified for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Once again, we conclude that Defendant's arguments lack merit.⁷

As was the case with respect to his challenge to the second 18 March 2013 order, Defendant contends that the 4 June 2013 order affected a substantial right "to assert a defense and plea in bar to Plaintiff's claims." Assuming, without deciding, that orders rejecting pleas in bar are immediately appealable on the basis of the substantial right doctrine, the 4 June 2013 order did not reject a defense "that denie[d] [Plaintiff's] right to maintain the action, and which, if established, [would have] destroy[ed] the action." *Mercer*, 249 N.C. at 728, 107 S.E.2d at 556. On the contrary, even if Judge Brooks erred by entering a consent judgment that did not accurately reflect the agreement set out in the 6 April 2013 memorandum of decision, a question about which we express no opinion at this point, that fact would simply invalidate the consent judgment rather than bar Plaintiff's equitable distribution claim. As a result, since the trial court did not reject a plea in bar in the 4 June 2013 order, Defendant is not entitled to an immediate appeal from that order based on the principle set out in *Mercer*.

Secondly, Defendant contends that he is entitled to an immediate appeal from the 4 June 2013 order on the grounds that the issues addressed and resolved in that order are intertwined with other

7. As a result of the fact that we have not reached the merits of Defendant's challenges to the 4 June 2013 order, we express no opinion about the extent to which those challenges have been properly asserted or have any substantive validity.

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issues that remain to be resolved in this case. As we have previously indicated, an interlocutory order affects a substantial right in the event that there is a risk that the failure to provide immediate appellate review creates a risk that inconsistent judgments will result. However, we are unable to see how a failure to consider the issues raised by Defendant's challenge to the 4 June 2013 order on appeal at this time creates such a risk and Defendant has not satisfactorily explained to us how such a result would come about. Simply put, given that no decision has been reached with respect to the merits of Defendant's claim for annulment, a failure to consider whether the 6 May 2010 consent judgment accurately reflects the agreement between the parties embodied in the 6 April 2010 memorandum of decision poses no risk that inconsistent decisions will be made with respect to any matter at issue in this case.

Finally, Defendant argues that, in the event that he is not entitled to an immediate appeal from the 4 June 2013 order on substantial right grounds, he is entitled to obtain appellate review of that order on an interlocutory basis as a result of the trial court's decision to certify the 4 June 2013 order for immediate appeal. However, the trial court's certification was not effective to allow an immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), given that the 4 June 2013 order did not finally resolve any claim between the parties. Although Defendant contends that the 4 June 2013 order "represents" a final judgment with respect to his annulment claim, the order in question simply does not address, much less finally resolve, the validity of Defendant's annulment claim on the merits. Thus, Defendant is not entitled to immediate appellate review of the 4 June 2013 order pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). As a result, given that none of the bases upon which Defendant relies in support of his request for immediate appellate review of the 4 June 2013 order have any validity, we must dismiss his appeal from that order as well.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's appeal has been taken from two unappealable interlocutory orders and is not properly before this Court. As a result, Defendant's appeal should be, and hereby is, dismissed.

APPEAL DISMISSED.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Chief Judge MARTIN concurred in this opinion prior to 1 August 2014.

IN RE S.T.B.

[235 N.C. App. 290 (2014)]

IN THE MATTER OF S.T.B., JR. AND O.N.B.

No. COA14-213

Filed 5 August 2014

1. Jurisdiction—subject matter—termination of parental rights—guardian ad litem program functions as team

The trial court did not lack subject matter jurisdiction in a termination of parental rights case. The General Assembly intended for abused, neglected, and/or dependent minor children to be represented by the guardian ad litem program and for the participants in that program to function as a team. Thus, the termination petition in this case was properly filed and verified even though it was not done by a guardian ad litem program specialist and not the volunteer guardian ad litem.

2. Termination of Parental Rights—grounds—failure to pay reasonable portion of costs while in foster care

The trial court did not err by concluding that respondent father's parental rights in the minor children were subject to termination on the grounds that he failed to pay a reasonable portion of the cost of the care they received while in foster care as authorized by N.C.G.S. § 7B-1111(a)(3). Record evidence and the trial court's findings established that respondent had the ability to pay some amount greater than zero for the support of the children but failed to do so.

Appeal by respondent from order entered 6 November 2013 by Judge Deborah Brown in Iredell County District Court. Heard in the Court of Appeals 22 July 2014.

Lauren Vaughan for Iredell County Department of Social Services, petitioner-appellee.

Melanie Stewart Cranford for Guardian ad Litem, petitioner-appellee.

Jeffrey L. Miller for father, respondent-appellant.

ERVIN, Judge.

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Respondent-Father S.B. appeals from an order terminating his parental rights in S.T.B., Jr., and O.N.B.¹ On appeal, Respondent-Father contends that the trial court lacked jurisdiction over this case given that the termination petition was filed and verified by a person who lacked the authority to take those actions, that the trial court erred by determining that his parental rights in Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) on the grounds that Opal had not been in foster care pursuant to an order of the court for twelve months as of the date upon which the termination petition was filed, that the trial court erred by terminating his parental rights in Sam pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) on the grounds that the relevant findings of fact lacked adequate evidentiary support and failed to support the trial court's finding that this ground for termination existed, and that the trial court erred by terminating his parental rights in both children pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) on the grounds that the relevant findings of fact lacked adequate evidentiary support and failed to support the trial court's finding that this ground for termination existed. After careful consideration of Respondent-Father's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 23 March 2012, the Iredell County Department of Social Services filed a petition alleging that Sam was a neglected and dependent juvenile based on illegal drug use by Respondent-Mother Samantha K.,² Respondent-Mother's incarceration, and the fact that Sam tested positive for cocaine at birth. DSS took nonsecure custody of Sam contemporaneously with the filing of the initial petition, while Opal was in the care of Respondent-Father's mother at that time. Although DSS alleged that Respondent-Father was Sam's father in the initial petition, Sam's paternity had not been scientifically confirmed or judicially established as of the date upon which the initial petition was filed.

After a hearing held on 2 May 2012, Sam was determined to be a dependent juvenile. Following a dispositional hearing held on 3 July 2012, Respondent-Father was determined to be Sam's father based upon

1. S.T.B., Jr., and O.N.B. will be referred to throughout the remainder of this opinion as "Sam" and "Opal," pseudonyms used for ease of reading and to protect the juveniles' privacy.

2. As a result of the fact that she did not note an appeal to this Court from the trial court's termination order, Respondent-Mother's parental rights in the children have been finally adjudicated.

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DNA testing results, Sam was retained in DSS custody, and Respondent-Father was ordered to pay child support, submit to random drug testing, and comply with the provisions of his case plan.

On 1 August 2012, DSS filed a petition alleging that Opal was a neglected juvenile. At a hearing held on 28 August 2012, Opal was adjudicated to be a neglected juvenile based upon a stipulation entered into between the parties. At the conclusion of the resulting dispositional proceeding, Opal was placed in DSS custody and Respondent-Father was ordered to comply with the provisions of his case plan, submit to random drug tests, obtain and maintain stable housing and employment, complete parenting classes, maintain regular contact with DSS, refrain from engaging in criminal activity, and pay child support.

On 20 November 2012, a review and permanency planning hearing was held. At the conclusion of that proceeding, DSS was relieved of further responsibility for attempting to reunify Sam and Opal with their parents and the permanent plan for the two children was changed to adoption.

On 21 May 2013, Kathy K. Martin, a program specialist with the Guardian *ad Litem* program, filed and verified a petition seeking to have Respondent-Mother's and Respondent-Father's parental rights in Sam and Opal terminated on the grounds of neglect as authorized by N.C. Gen. Stat. § 7B-1111(a)(1); leaving the children in foster care for more than twelve months without making reasonable progress toward correcting the conditions that led to the children's removal from the home as authorized by N.C. Gen. Stat. § 7B-1111(a)(2); failing to pay a reasonable portion of the cost of the care that the children had received as authorized by N.C. Gen. Stat. § 7B-1111(a)(3); and willfully abandoning the children as authorized by N.C. Gen. Stat. § 7B-1111(a)(7).

After conducting a hearing concerning the issues raised in the termination petition on 24 July 2013, the trial court entered an order on 6 November 2013 finding that Respondent-Father's parental rights in Sam and Opal were subject to termination on the grounds that he had allowed the children to remain in foster care for more than twelve months without making reasonable progress in addressing the conditions that led to their removal from the home pursuant to N. C. Gen. Stat. § 7B-1111(a)(2) and that he had failed to pay a reasonable portion of the cost of the care that had been provided to the children pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) and concluding that the termination of Respondent-Father's parental rights would be in the children's best interest. Respondent-Father noted an appeal to this Court from the trial court's order.

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II. Substantive Legal AnalysisA. Subject Matter Jurisdiction

[1] In his initial challenge to the trial court's order, Respondent-Father contends that the trial court lacked jurisdiction over the subject matter of this case on the grounds that the petition seeking to have Respondent-Father's parental rights in the children terminated had been filed by a person who had no standing to file or verify such a petition. More specifically, Respondent-Father contends that the trial court lacked the authority to address the issues raised in the termination petition because it was filed and verified by "Kathy K. Martin, Guardian *ad Litem* ("GAL") Program Specialist, by and through the undersigned Attorney Advocate," rather than by David Hartness, who served as the volunteer guardian *ad litem* appointed to represent the children and who did most of the work performed in connection with the representation of Sam and Opal in this proceeding. We do not find Respondent-Father's argument persuasive.

"Standing is jurisdictional in nature and '[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.'" *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (quoting *In re Will of Barnes*, 157 N.C. App. 144, 155, 579 S.E.2d 585, 592 (2003), *reversed on other grounds*, 358 N.C. 143, 592 S.E.2d 688 (2004)). According to N.C. Gen. Stat. §§ 7B-1103(a)(6) and 7B-1104, a petition seeking the termination of a parent's parental rights in one or more children may be filed by "[a]ny guardian *ad litem* appointed to represent the minor juvenile pursuant to [N.C. Gen. Stat. §] 7B-601 who has not been relieved of this responsibility" and must "be verified by the petitioner[.]" In view of the fact that the extent of a trial court's jurisdiction over the subject matter of a particular case raises a question of law, we will review Respondent-Father's challenge to Ms. Martin's standing to file and verify the termination petition using a *de novo* standard of review. *In re E.J.*, __ N.C. App. __, 738 S.E.2d 204, 206 (2013).

As N.C. Gen. Stat. § 7B-601(a) reflects, "[t]he guardian *ad litem* and attorney advocate have standing to represent the juvenile in all actions under this Subchapter where they have been appointed" and must be appointed "pursuant to the program established by Article 12 of this Chapter[.]" N.C. Gen. Stat. § 7B-601(a).

When read *in pari materia*, these statutes [that address guardian *ad litem* appointment, duties, and administration] manifest the legislative intent that representation of a minor child in proceedings under [N.C. Gen. Stat.

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§] 7B-601 and [N.C. Gen. Stat. §] 7B-1108 is to be . . . by the GAL program established in Article 12 of the Juvenile Code. Under Article 12 volunteer GALs, the program attorney, the program coordinator, and clerical staff constitute the GAL program.

In re J.H.K., 365 N.C. 171, 175, 711 S.E.2d 118, 120 (2011); *see also In re A.N.L.*, 213 N.C. App. 266, 269-70, 714 S.E.2d 189, 192 (2011) (holding that a child “was adequately represented by the [guardian *ad litem* p]rogram pursuant to N.C. Gen. Stat. § 7B-601(a)” despite the absence of the volunteer guardian *ad litem* from the hearing given that the attorney advocate “was present . . . during both portions of the proceedings” and “actively participated by questioning witnesses and offering recommendations for adjudication and disposition”). As a result, the Supreme Court has rejected an interpretation of the relevant statutory provisions that failed to recognize the fact that the participants in the guardian *ad litem* program function as a team instead of a collection of individuals, *J.H.K.*, 365 N.C. at 177, 711 S.E.2d at 121, noting that the General Assembly did not specify duties to be performed by each specific member of the team. *Id.* at 176, 711 S.E.2d at 121. The argument that Respondent-Father has advanced in support of his challenge to the trial court’s jurisdiction over the subject matter of this case, which lacks support in any specific prior decision of either the Supreme Court or this Court and which interprets N.C. Gen. Stat. § 7B-1103(a)(6) to mean that the only member of the guardian *ad litem* team authorized to file and verify a termination petition is the volunteer guardian *ad litem*, is directly contrary to the interpretive approach adopted in *J.H.K.* As a result, given that the General Assembly intended for Sam and Opal to be represented by the guardian *ad litem* program and for the participants in that program to function as a team, we conclude that the termination petition at issue in this case was properly filed and verified and that Respondent-Father’s argument to the contrary lacks merit.

B. Grounds for Termination

[2] Secondly, Respondent-Father argues that the trial court erred by concluding that his parental rights in Sam and Opal were subject to termination on the grounds that he failed to pay a reasonable portion of the cost of the care that Sam and Opal received while in foster care as authorized by N.C. Gen. Stat. § 7B-1111(a)(3). More specifically, Respondent-Father argues that the trial court erred by determining that his parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) on the grounds that the trial court did not find, and the record evidence did not show, that he had willfully

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failed to pay a reasonable portion of the cost of the care that Sam and Opal received during the six month period immediately preceding the filing of the termination petition despite having the ability to do so. Respondent-Father's argument lacks merit.

A parent's parental rights in a child are subject to termination in the event that

[t]he juvenile has been placed in the custody of a county department of social services, . . . or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3). "The word 'willful' means something more than an intention to do a thing. It implies doing the act *purposely* and *deliberately*. Manifestly, one does not act willfully in failing to make support payments if it has not been within his power to do so." *In re Adoption of Maynor*, 38 N.C. App. 724, 726, 248 S.E.2d 875, 877 (1978) (emphasis in original) (citations omitted). "A parent's ability to pay is the controlling characteristic of what is a 'reasonable portion' of cost of foster care for the child which the parent must pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981). "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *Id.* "[N]onpayment would constitute a failure to pay a 'reasonable portion' if and only if respondent were able to pay some amount greater than zero." *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802 (1982). In evaluating the validity of Respondent-Father's contention that the trial court erred by determining that his parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(3), we must examine "whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984).

In its termination order, the trial court determined that Respondent-Father, "for a continuous period of six months next preceding the filing of the TPR petition, ha[d] willfully failed for such period to pay a reasonable portion of the cost of care for the juveniles, although physically and financially able to do so[.]" In support of this conclusion, the trial court found as fact that:

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53. Since the juveniles have been in the custody of the Department, the Respondent Father has never brought any gifts for the juveniles, has never paid any child support for the benefit of the juveniles, and has not sent any cards or letters to the juveniles.

. . . .

55. The Respondent Mother is under a child support order which orders her to pay \$50 per month for the benefit of each of the juveniles. The Respondent Father is also under a child support order which orders him to pay \$50 per month for the benefit of each of the juveniles. Neither parent has paid any amount towards their respective child support obligations, and the Court is unaware of any disability which would prevent the parents from paying some amount toward these obligations.

As a result of the fact that Respondent-Father has refrained from challenging either of these findings as lacking in sufficient evidentiary support, they are deemed to be supported by competent evidence and are binding on appeal. *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

Although Respondent-Father contends in his brief that the evidence contained in the record developed at the termination hearing and the trial court's findings of fact did not suffice to adequately establish that he had the ability to pay any portion of the cost of Sam's and Opal's care during the relevant six month period and points to findings in prior orders concerning his continued unemployment and his failure to make certain payments required under a probationary judgment, this argument overlooks the fact that the issue of his ability to pay is addressed and resolved by the fact that he was subject to a child support order that required him to pay \$50 per month for the benefit of his children. As this Court has previously stated, given that "a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period." *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990) (citations omitted). In addition to finding that Respondent-Father was subject to a child support order that required him to pay \$50 per month for the benefit of the children, the trial court also found that it was not aware

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that Respondent-Father was subject to any disability that would prevent him from paying some amount of support. As a result, given that record evidence and the trial court's findings establish that Respondent-Father had the ability to pay some amount greater than zero for the support of the children, the trial court did not err by determining that Respondent-Father's parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(3).³

III. Conclusion

Thus, none of Respondent-Father's arguments adequately support his request that the trial court's termination order be overturned. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges McGEE and STEELMAN concur.

3. Although Respondent-Father also argues that the trial court erred by concluding that his parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), we need not address this aspect of his challenge to the trial court's termination order given our decision to uphold the trial court's decision that Respondent-Father's parental rights in Sam and Opal were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). See *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) (holding that a finding that one ground for the termination of a parent's parental rights exists is sufficient to support a termination order).

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[235 N.C. App. 298 (2014)]

IN THE MATTER OF THE PURPORTED WILL OF RUBY SHAW SHEPHERD, DECEASED

No. COA 13-1149

Filed 5 August 2014

1. Wills—election of remedies—pursuit of elective share of a testate estate and will caveat not inconsistent

The trial court erred in a caveat proceeding challenging a will by granting summary judgment in favor of propounder on the basis of the doctrine of election of remedies. A petition for payment of a spousal elective share was not inconsistent with the institution of a caveat action to contest a will.

2. Estoppel—judicial estoppel—caveat action—petition for elective share

The trial court abused its discretion by applying judicial estoppel as a bar to a caveat action after the trial court ordered payment of an elective share. Caveator's statement in his petition for an elective share was consistent with the determination made by the clerk and the legal presumption that the purported will was the valid will of decedent until set aside by a caveat action.

3. Estoppel—quasi-estoppel—receipt of elective share

The trial court erred in a caveat proceeding challenging a will by granting summary judgment in favor of propounder based on caveator's receipt of an elective share. Caveator cannot be estopped from pursuing the caveat action based on his receipt of the elective share because he would be entitled to that amount of cash in any event. Further, he has not exercised a right under the will to any specific property he would not otherwise be entitled to receive.

Appeal by Caveator from Order entered 12 April 2013 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 19 February 2014.

Wall Esleeck Babcock LLP, by Andrew L. Fitzgerald, and Hickmon & Perrin, PC, by James E. Hickmon, for Caveator.

Helms, Robison & Lee P.A., by R. Kenneth Helms, Jr., and Aimee E. Brockington, for Propounder.

STEPHENS, Judge.

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Factual Background and Procedural History

This appeal arises from a caveat proceeding challenging the will of Ruby Shaw Shepherd (“Decedent”). Decedent died on 21 February 2010 in Fort Myers, Florida. At the time of her death, Decedent was a resident of Union County, North Carolina. Decedent is survived by her husband of nearly thirty years, Caveator James A. Shepherd, and four children from a previous marriage, including Propounder Angela Caroline Jeffers Bullock.

On 7 April 2010, Propounder filed in the Union County Superior Court clerk’s office an application for probate and letters testamentary and a document entitled “Last Will and Testament of Ruby Shaw Shepherd,” which purported to be the will of Decedent. The purported will made no mention of Caveator and named Propounder as the executrix of Decedent’s estate. With the exception of several specific devises of tangible personal property, the purported will provided that Decedent’s estate was to be divided equally among her four children. The clerk of superior court admitted the purported will to probate in the common form in the Estates Division of the Superior Court of Union County.¹

Caveator filed a verified petition for an elective share on 18 June 2010, seeking a statutory spousal elective share from the estate of Decedent. In Caveator’s petition for elective share, he stated that Decedent “died testate . . . and [that] her Last Will and Testament was probated on April 7, 2010.”

Propounder filed the inventory for Decedent’s estate and an addendum thereto on 14 September 2010. The inventory indicated that Decedent’s estate contained total assets in the amount of \$1,894,928.97.

Caveator filed a caveat to the purported will of Decedent on 29 October 2010. In his petition, Caveator alleged that, “[u]pon information and belief, [Decedent’s purported will] . . . is not the Last Will and Testament of Ruby Shaw Shepherd” because Decedent either did not sign the purported will, or, if she did, she did so under “undue and improper influence and duress.” Propounder filed an answer to the caveat on 19 November 2010. Subsequently, an order was entered *sua sponte* by the clerk of superior court on 3 December 2010 staying the

1. Although the application for probate and letters testamentary are included in the record, the certificate of probate and the letters testamentary are not. Thus, this Court has no information in the record to verify the date that the purported will was admitted to probate. We must assume from the progression of the probate of the purported will that a certificate of probate was issued.

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hearing on Caveator's petition for an elective share until the resolution of the caveat action.² Propounder appealed from this order to the trial court.³ The trial court entered an order on 21 January 2011 reversing the clerk's stay order and remanding the administration of the estate and the petition for elective share to the clerk for further proceedings consistent with the trial court's reversal order. Following the trial court's reversal of the stay order, Caveator filed a motion to compel partial payment of the spousal elective share, to compel payment of expert fees, for issuance of an order to show cause, for revocation of Propounder's letters testamentary, and for attorneys' fees. In this motion, Caveator referred to the paper writing offered for probate as the "Decedent's purported will." Caveator also referred to the paper writing as the purported will in his memorandum in support of the motion for partial payment of the spousal elective share; however, Caveator calculated the spousal elective share based on the value of property passing according to the probate of Decedent's purported will.⁴ Caveator's motion for partial payment of the spousal elective share was continued by the clerk of court until the parties engaged in mediation. Caveator's motion for attorneys' fees was granted, and his remaining motions were denied.

On 19 December 2012, the clerk of court entered an "Order Determining Elective Share" whereby the spousal elective share was calculated to be \$36,028.93 and Propounder, as Executrix of the Estate of Decedent, was ordered to pay the whole amount to Caveator. The clerk's order did not mention the caveat proceeding, and the clerk calculated the elective share based on the values of the probate estate, wherein no property passed to Caveator under the purported will.

Following the order for payment of the spousal elective share, Propounder filed a motion for summary judgment as to the caveat on 8 March 2013. In her summary judgment motion, Propounder argued

2. The clerk's 3 December 2010 order also stayed hearing on a petition for recovery of estate assets filed by Propounder. No copy of this petition is included in the record.

3. Although both briefs indicate Propounder appealed the 3 December 2010 order, no copy of the notice of appeal is included in the record to indicate the date or grounds for said appeal.

4. Calculation of the elective share is defined in Article 1A of Chapter 30 of the North Carolina General Statutes. The share to which a surviving spouse is entitled is diminished by the property he or she is already receiving, either under the probate estate, by intestate succession, or by other means. Here, Caveator received nothing under the purported will. However, his share received by intestate succession would be approximately one-third of the estate. *See* N.C. Gen. Stat. § 29-14 (2013). Therefore, the calculation of the elective share would differ depending on which way Caveator was to receive property.

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that Caveator was estopped from pursuing the caveat because his position that the purported will was not valid was inconsistent with the position he maintained in the elective share action. Caveator filed a memorandum opposing Propounder's motion for summary judgment on 21 March 2013. The trial court entered an order on 12 April 2013 granting Propounder's motion. Caveator appeals.

Discussion

On appeal, Caveator argues that the trial court (1) erred in granting summary judgment in favor of Propounder on grounds that the doctrine of election of remedies bars Caveator from sustaining the caveat action, and (2) abused its discretion by holding that the doctrine of judicial estoppel also barred Caveator from sustaining the caveat action.⁵ Caveator contends that the doctrine of election of remedies is not applicable in the case *sub judice* because payment of a spousal elective share and caveat of a will are not inconsistent remedies. Further, Caveator contends that the doctrine of judicial estoppel is not applicable in this case because Caveator did not make clearly inconsistent factual assertions. We agree and reverse the order of the trial court.

I. Election of Remedies

[1] Caveator argues that the trial court erred in granting summary judgment on the basis of the doctrine of election of remedies because a petition for payment of a spousal elective share is not inconsistent with the institution of a caveat action to contest a will. In contrast, Propounder argues that Caveator is estopped from pursuing the caveat action because it is predicated on an "opposite and irreconcilable" position from Caveator's position in the elective share proceeding. We conclude that the two remedies are not inconsistent and, therefore, that the doctrine of election of remedies is not applicable.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted; italics added).

5. In support of her motion for summary judgment, Propounder argued that Caveator was estopped from pursuing the caveat according to the equitable doctrines of election of remedies and judicial estoppel. The trial court did not identify the grounds on which summary judgment was granted in favor of Propounder.

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“The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong.” *Triangle Park Chiropractic v. Battaglia*, 139 N.C. App. 201, 204, 532 S.E.2d 833, 835 (citation omitted), *disc. review denied*, 352 N.C. 683, 545 S.E.2d 728 (2000). “The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to coexisting and consistent remedies.” *Pritchard v. Williams*, 175 N.C. 319, 323, 95 S.E. 570, 571 (1918) (internal quotation marks omitted). “One is held to have made an election of remedies when he chooses with knowledge of the facts between two inconsistent remedial rights.” *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 687 (1989) (citation omitted). “[A]n election of remedies presupposes a right to elect.” *Competitor Liaison Bureau of NASCAR, Inc. v. Midkiff*, 246 N.C. 409, 414, 98 S.E.2d 468, 472 (1957) (citation and internal quotation marks omitted). “A party cannot . . . occupy inconsistent positions. . . . But the doctrine of election applies only where two or more existing remedies are alternative and inconsistent. If the remedies are not inconsistent, there is no ground for election.” *Douglas v. Parks*, 68 N.C. App. 496, 498, 315 S.E.2d 84, 85 (citation omitted; emphasis added), *disc. review denied*, 311 N.C. 754, 321 S.E.2d 131 (1984). “It is the inconsistency of the demands which makes the election of one remedial right an estoppel against the assertion of the other” *Richardson v. Richardson*, 261 N.C. 521, 530, 135 S.E.2d 532, 539 (1964) (citation omitted).

A plaintiff is deemed to have made an election of remedies, and therefore estopped from suing a second defendant, only if he has sought and obtained final judgment against a first defendant and the remedy granted in the first judgment is repugnant [to] or inconsistent with the remedy sought in the second action.

Triangle Park Chiropractic, 139 N.C. App. at 203–04, 532 S.E.2d at 835.

Here, the issue is whether the pursuit of an elective share based on the administration of a testate estate and a will caveat are alternative and inconsistent remedies. “In general, the purpose of a caveat is to determine whether the paper[] writing purporting to be a will is in fact the last will and testament of the person for whom it is propounded.” *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 419, 558 S.E.2d 871, 878 (citation, internal quotation marks, and brackets omitted), *disc. review denied*, 355 N.C. 490, 563 S.E.2d 563 (2002). The right to claim an elective share is a statutory right created by section 30-3.1 which is given to “[t]he surviving spouse of a decedent who dies domiciled in

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[North Carolina].” N.C. Gen. Stat. § 30-3.1 (2013).⁶ The elective share is calculated as a share of the decedent’s “Total Net Assets” subtracted by the “Net Property Passing to Surviving Spouse,” as both terms are defined by section 30-3.2. *See* N.C. Gen. Stat. § 30-3.1. Thus, the surviving spouse’s elective share is reduced by the amount of property he or she is already going to receive. The “Net Property Passing to Surviving Spouse” includes property “(i) devised, outright or in trust, by the decedent to the surviving spouse or (ii) that passes, outright or in trust, to the surviving spouse by intestacy.” N.C. Gen. Stat. § 30-3.2(3c) (2013). By including both property devised to the surviving spouse and property passing by intestate succession in the calculation of the elective share, it is clear from the plain language of the statute that an elective share may be claimed by a surviving spouse whether the decedent dies testate or intestate. *See, e.g., Bland v. Harold L. & Audree S. Mills Charitable Remainder Unitrust*, __ N.C. App. __, 754 S.E.2d 259 (2014) (unpublished opinion), *available at* 2014 WL 220557 (holding that quasi-estoppel was inapplicable to bar a challenge to the validity of a trust where distributions received by the wife were less than the elective share of her husband’s intestate estate to which she would be entitled absent the trust); *In re Estate of Hendrick*, __ N.C. App. __, 753 S.E.2d 740 (2013) (unpublished opinion), *available at* 2013 WL 6237353 (holding that the wife was entitled to an elective share of the husband’s testate estate where other beneficiaries failed to establish grounds barring her entitlement).⁷ Section 30-3.4(b) also makes clear that a claim for an elective share is not dependent on whether the decedent dies testate because it requires that the claim be made within “six months after the issuance of letters . . . in connection with the will or intestate proceeding.” N.C. Gen. Stat. § 30-3.4(b) (2013). Indeed, Propounder concedes in her brief that Caveator was entitled to pursue an elective share whether Decedent died testate or intestate. Because the caveat action is meant to determine whether a purported will is in fact the will of a decedent and the statutory right to claim an elective share does not depend on whether a decedent dies with a will, we conclude that the two remedies are not inconsistent.

6. Section 30-3.1 was modified by 2013 N.C. Sess. Laws 91, § 1.(d), effective 1 October 2013. The modification is not applicable to the issues on appeal in this case.

7. These opinions are unpublished and, thus, have no precedential value. N.C.R. App. P. 30(e). Nonetheless, they provide helpful examples of recent cases in which this Court has acknowledged the entitlement of a surviving spouse to an elective share in both testate and intestate estate administrations.

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In this case, however, Caveator made a specific assertion in his petition for elective share that Decedent “died testate” even though he was entitled to pursue an elective share whether Decedent died testate or not. On its face, this statement is inconsistent with Caveator’s challenge to the will. Propounder argues that such inconsistency estops him from pursuing the caveat action as an impermissible election of remedies. We disagree.

Propounder’s argument is misplaced as applied to the doctrine of election of remedies. As discussed above, the elective share proceeding is not an inconsistent and alternative remedy to the caveat action. Even if the elective share proceeding were inconsistent with the caveat action, however, Caveator’s assertion that Decedent died testate is irrelevant to the clerk’s calculation of the elective share.

“[P]robate is conclusive evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal.”⁸ N.C. Gen. Stat. § 28A-2A-12 (2013). When the clerk of superior court takes proof of a script and admits it to probate in common form, it is an *ex parte* proceeding, and the script “stands as the testator’s will, and his only will, until challenged and reversed” by caveat. *In re Will of Charles*, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965); *see also Walters v. Baptist Children’s Home of N.C., Inc.*, 251 N.C. 369, 377, 111 S.E.2d 707, 714 (1959) (“[T]he probate of a will by the [c]lerk of [s]uperior [c]ourt is . . . conclusive evidence of the validity of the will[] until vacated on appeal[] or declared void by a competent tribunal in a proceeding instituted for that purpose.”).

Consistent with our statutes and established case law, the trial court’s 21 January 2011 order, which reversed the stay of the elective share proceeding until the resolution of the caveat action, concluded that probate “of the [w]ill is conclusive unless and until it is vacated on appeal or declared void by a competent tribunal in a caveat proceeding.” In addition, the trial court concluded, *inter alia*, that (1) the will had not been set aside by the caveat because no determination had been reached in that proceeding, (2) the filing of the caveat did not stay the administration of the estate or the elective share proceeding, and (3) the elective share proceeding should be remanded to the clerk to proceed accordingly. As a result, the clerk was obligated on remand to calculate the elective share in accordance with the probate

8. This statute was codified as N.C. Gen. Stat. § 31-19 in 2010, when Decedent died. It was re-codified as N.C. Gen. Stat. § 28A-2A-12, effective 1 January 2012, by 2011 N.C. Sess. Laws 344.

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of Decedent's purported will, regardless of Caveator's assertion in his petition. Consequently, Caveator had no "right to elect" between calculation of the elective share on the basis of a testate or intestate estate administration. *See, e.g., Competitor Liaison Bureau of NASCAR, Inc.*, 246 N.C. at 414, 98 S.E.2d at 472. Though Caveator chose to pursue an elective share, that remedy, alone, is not inconsistent with a caveat. Moreover, the doctrine of election of remedies cannot be applied to bar the award of the elective share to Caveator based solely on the clerk's administration of Decedent's estate as a testate estate. Indeed, to the extent Caveator could have alleged an inconsistent remedy in his petition for an elective share, that element of his petition cannot work to bar his caveat proceeding when the clerk had no choice but to calculate the elective share based on a testate estate administration. Accordingly, we hold that the doctrine of election of remedies does not work to bar Caveator's challenge to the will.

II. Judicial Estoppel

[2] Caveator also argues that the trial court abused its discretion by applying judicial estoppel as a bar to the caveat action after the trial court ordered payment of the elective share. In opposition, Propounder contends that judicial estoppel was properly applied because Caveator asserted inconsistent factual positions by alleging both the validity and the invalidity of Decedent's will. We disagree.

"[J]udicial estoppel is to be applied in the sound discretion of our trial courts." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 33, 591 S.E.2d 870, 891 (2004). "[A] trial court's application of judicial estoppel is reviewed for abuse of discretion." *Id.* at 38, 591 S.E.2d at 894 (citations omitted). "[W]hen a trial court has acted within its discretion in applying judicial estoppel, leaving no triable issues of material fact, summary judgment is appropriate." *Id.* at 39, 591 S.E.2d at 895 (citations omitted). "If the trial court did not abuse its discretion in determining that [judicial estoppel is applicable], there are no triable issues of fact . . . as a matter of law, rendering summary judgment appropriate." *Bioletti v. Bioletti*, 204 N.C. App. 270, 274, 693 S.E.2d 691, 694-95 (2010). "Where the essential element of inconsistent positions is not present, it is an abuse of discretion to bar [the] plaintiff's claim on the basis of judicial estoppel." *Estate of Means v. Scott Elec. Co.*, 207 N.C. App. 713, 719, 701 S.E.2d 294, 299 (2010) (citation omitted).

"[T]he purpose of the [judicial estoppel] doctrine [i]s to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."

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Whitacre P'ship, 358 N.C. at 28, 591 S.E.2d at 888 (citations and internal quotation marks omitted). “[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.” *T-Wol Acquisition Co. v. ECDG South, LLC*, N.C. App. , , 725 S.E.2d 605, 612 (2012) (citation and internal quotation marks omitted). Nevertheless,

our Supreme Court [has] set forth three factors which may be considered in determining whether the doctrine is applicable: First, a party’s subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at __, 725 S.E.2d at 612-13 (citation omitted). “[T]hese three factors do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel and . . . additional considerations may inform the doctrine’s application in specific factual contexts.” *Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 889 (citation and internal quotation marks omitted). “The first factor, and the only factor that is an essential element which must be present for judicial estoppel to apply[,] is that a party’s subsequent position must be clearly inconsistent with its earlier position.” *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004) (citation and internal quotation marks omitted). “[J]udicial estoppel is limited to the context of inconsistent factual assertions and . . . the doctrine should not be applied to prevent the assertion of inconsistent legal theories.” *Whitacre P'ship*, 358 N.C. at 32, 591 S.E.2d at 890. When the record and pleadings are examined as a whole, minor discrepancies in a position consistently maintained do not amount to “clearly inconsistent” positions. *Harvey v. McLaughlin*, 172 N.C. App. 582, 585, 616 S.E.2d 660, 663 (2005) (holding that discrepancies in allegations in the plaintiff’s complaint regarding the date of the onset of injury were not clearly inconsistent positions where the plaintiff maintained one position as a whole), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 250 (2006); *see also Estate of Means*,

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207 N.C. App. at 720, 701 S.E.2d at 299 (holding that differences in allegations of knowledge of the two defendants in a negligence action which were “in general . . . not inconsistent,” and meant to show separate duties owed by each defendant, were not factually inconsistent positions).

Here, Caveator stated in his petition for an elective share that Decedent “died testate” and that “her Last Will and Testament was probated on April 7, 2010.” Four months later, however, Caveator stated in his caveat that Decedent “did not . . . sign and execute said paper writing as her Last Will and Testament” and that, if she did, it was due to “undue and improper influence and duress.” Propounder argues that these statements represent clearly inconsistent factual assertions. We disagree.

No will is valid unless it complies with the relevant statutory requirements. N.C. Gen. Stat. § 31-3.1. “[T]he [c]lerk of the [s]uperior [c]ourt has the sole power in the first instance to determine whether a decedent died testate or intestate, and if he died testate, whether the script in dispute is his will.” *Walters*, 251 N.C. at 376, 111 S.E.2d at 713 (citation and internal quotation marks omitted). “[T]he probate of a will by the [c]lerk of [s]uperior [c]ourt is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose.” *Id.* at 377, 111 S.E.2d at 714; *see also* N.C. Gen. Stat. § 28A-2A-12; *In re Will of Spinks*, 7 N.C. App. 417, 173 S.E.2d 1 (1970) (upholding the clerk’s denial of a motion by a group of surviving family members to set aside probate of a holographic will because there was no inherent or fatal defect appearing on the face of the will and no caveat action was filed). “And until so set aside it is presumed to be the will of the testator.” *Walters*, 251 N.C. at 377, 111 S.E.2d at 714. In addition, “the proper execution of [a] will [is] a mixed question of law and fact.” *Burney v. Allen*, 127 N.C. 476, 478, 37 S.E. 501, 502 (1900); *see also In re Will of Mucci*, 287 N.C. 26, 213 S.E.2d 207 (1975) (holding that directed verdict as to whether a will may be probated is the best procedure when no evidence of testamentary intent is presented); *In re Will of Deyton*, 177 N.C. 494, 507, 99 S.E. 424, 430 (1919) (“But the facts must be found by the jury, in order that we may pass upon the validity of the paper[] writings as the will of the deceased.”); *In re Will of Mason*, 168 N.C. App. 160, 606 S.E.2d 921 (holding that directed verdict is appropriate as to the validity of a will when there are no evidentiary issues to be resolved), *disc. review denied*, 359 N.C. 411, 613 S.E.2d 26 (2005).

Here, Decedent’s purported will was admitted to probate by the clerk of superior court before Caveator filed the petition for an elective

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share.⁹ By admitting the purported will to probate, the clerk made the determination that Decedent died testate and that the purported will was the last will and testament of Decedent. *See, e.g., Walters*, 251 N.C. at 377, 111 S.E.2d at 714. Caveator's statement in his petition for an elective share is consistent with the determination made by the clerk and the legal presumption that the purported will is the valid will of Decedent until set aside by a caveat action. *See id.* Further, as the validity of a will is a mixed issue of law and fact, Caveator's statements that Decedent "died testate" and that "her Last Will" was probated are not factual assertions as to the will's validity, and, therefore, judicial estoppel is not applicable in this case.

III. Receipt of a Benefit

[3] Caveator also argues that estoppel does not otherwise apply to bar him from pursuing the caveat when he accepted property to which he was already entitled. Propounder responds that estoppel does, in fact, apply because Caveator actually received a "benefit under the will," which bars him from thereafter seeking to invalidate it. This response is incorrect.

Although Propounder and Caveator make these arguments in the context of the doctrine of election of remedies, the cases cited are more representative of the principle of quasi-estoppel. In defining quasi-estoppel, or "estoppel by benefit," the North Carolina Supreme Court has stated that, "[u]nder a quasi estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship*, 358 N.C. at 18, 591 S.E.2d at 881-82 (citations and internal quotation marks omitted). "[T]he essential purpose of quasi-estoppel is to prevent a party from benefiting by taking two clearly inconsistent positions." *Id.* at 18-19, 591 S.E.2d at 882 (citation, internal quotation marks, and ellipsis omitted). In the context of a will, a party that has "judicially asserted rights consistent with the validity of the will . . . is estopped, in a subsequent proceeding, from asserting the inconsistent position of disputing the will's validity." *In re Will of Lamanski*, 149 N.C. App. 647, 650, 561 S.E.2d 537, 540 (2002) (citation omitted) [hereinafter *Will of Lamanski*]. The cases cited by Caveator further address the doctrine of quasi-estoppel in the specific context of a will caveat and its exceptions.

9. According to the petition for an elective share, the purported will was admitted to probate on 7 April 2010.

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In *In re the Will of Peacock*, a decedent's son instituted a caveat proceeding after receiving a check under the decedent's will. 18 N.C. App. 554, 555, 197 S.E.2d 254, 255 (1973) [hereinafter *Will of Peacock*]. In analyzing whether the decedent's son could be estopped from pursuing the caveat on grounds that he had already taken under the will, this Court observed that the share of the estate to which the decedent's son would be entitled would be greater than the amount of the check he had already received if his caveat proceeding were successful. *Id.* at 556, 197 S.E.2d at 255. Specifically, the Court held that

[the son's] acceptance of a check for less than [the amount of his share of the intestate estate] could in no way prejudice his sisters in [the] event [the] probate of the will is subsequently set aside. Nothing in the circumstances indicates any reason why it would be inequitable for [the son] to proceed with his caveat.

Id.

Similarly, in *In re Will of Smith*, this Court held that the decedent's daughter was not estopped from pursuing a caveat even though she received a car under the will. 158 N.C. App. 722, 724-25, 582 S.E.2d 356, 358 (2003) [hereinafter *Will of Smith*]. The Court observed that the daughter was entitled to the car under the will admitted to probate, a prior will, or via intestate succession. *Id.* Quoting *Will of Peacock*, the Court further reasoned that, because the daughter's caveat would not change the disposition of the car, it was not inequitable for her to receive the car and pursue the caveat. *Id.*

Will of Lamanski arose in a slightly different factual situation from *Will of Smith* and *Will of Peacock*. In *Will of Lamanski*, the decedent's will gave her sister the choice of certain items of tangible personal property in the decedent's home. 149 N.C. App. at 647, 561 S.E.2d at 538. Under that provision, the decedent's sister chose specific pieces of property, some of which were delivered to her pursuant to the bequest. *Id.* at 648, 561 S.E.2d at 539. When the executrix of the decedent's will failed to deliver the other items, however, the decedent's sister filed a caveat despite retaining the items of tangible personal property that had been delivered to her under the will. *Id.* The sister argued that retention of the tangible personal property should not work to estop her from pursuing the caveat because, if the will were set aside, she would be entitled to one-third of the estate, which was more than the value of the property she retained. *Id.* at 651, 561 S.E.2d at 540. Acknowledging the rule set forth in *Will of Peacock* and applied in *Will of Smith*, *i.e.*, that "one

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cannot be estopped by accepting that which he would be legally entitled to receive in any event,” we distinguished the facts in *Will of Lamanski*. *Id.* at 651, 561 S.E.2d at 540-41. Specifically, we pointed out that the beneficiary in *Will of Peacock* received cash in an amount less than he would have received if the will were set aside. *Id.* In *Will of Lamanski*, however, the decedent’s sister had been given a right to choose from among items of tangible personal property in the decedent’s home. *Id.* Otherwise, the sister “would have had no legal right, outside the will, to the specific personal property which she received and retained pursuant to the specific bequest.” *Id.* Thus, the distinguishing factor in *Will of Lamanski* was the sister’s choice of specific property which she would not necessarily receive if the will were set aside. *Id.*

In this case, unlike *Will of Lamanski*, Caveator did not receive a specific bequest. Rather, he asserted his right to an elective share, consistent with the validity of the will. The amount of the elective share awarded to Caveator was a cash amount that was a direct result of the probate of Decedent’s will. Modeling our analysis after *Will of Peacock*, *Will of Smith*, and *Will of Lamanski*, we conclude that, if the will were set aside, Caveator would be entitled to receive a cash amount greater than he has already received. He has not exercised a right under the will to any specific property he would not otherwise be entitled to receive. Thus, Caveator cannot be estopped from pursuing the caveat action based on his receipt of the elective share because he would be entitled to that amount of cash in any event. Propounder’s argument is overruled.

Conclusion

Propounder argues that the trial court’s order, granting summary judgment, was appropriate pursuant to the equitable doctrines of election of remedies and judicial estoppel. We conclude, as discussed above, that neither doctrine is applicable here. Therefore, we hold that the trial court erred in granting summary judgment in favor of Propounder. We thus reverse that decision.

REVERSED.

Judges BRYANT and DILLON concur.

IRIS ENTERS., INC. v. FIVE WINS, LLC

[235 N.C. App. 311 (2014)]

IRIS ENTERPRISES, INC., PLAINTIFF

v.

FIVE WINS, LLC, DEFENDANT

No. COA14-192

Filed 5 August 2014

Mortgages and Deeds of Trust—foreclosure—declaratory judgment action—pay-off and attorney fees—law of the case

The trial court did not invade the sole province of a foreclosure trustee when it determined that the trustee had misapplied the funds from a foreclosure sale where the pay-off amount and attorney fees had been set by the court in a prior declaratory judgment. If one superior court judge cannot overrule another, the trustee of a property in foreclosure lacks authority to overrule a superior court judge. Defendant lost the opportunity to challenge the trial court's decision when it failed to appeal the declaratory judgment.

Appeal by defendant from Order entered 18 September 2013 by Judge Carl R. Fox in Superior Court, Wake County. Heard in the Court of Appeals 4 June 2014.

Hatch, Little & Bunn, LLP, by John N. McClain, Jr., A. Bartlett White, and Justin R. Apple, for plaintiff-appellee.

Morris, Russell, Eagle & Worley, PLLC, by Benjamin L. Worley, for defendant-appellant.

STROUD, Judge.

Five Wins, LLC (“defendant”), appeals from an order entered 18 September 2013, requiring the trustee of property encumbered by a deed of trust to pay Iris Enterprises (“plaintiff”) \$24,291.24 as surplus from the foreclosure sale of that property. We affirm.

I. Background

On 8 March 2007, Greenfield Durham, LLC executed a promissory note for \$3,959,000.00 in favor of Capital Bank. As collateral for that loan, plaintiff executed a deed of trust in favor of Capital on three pieces of real property. Iris is owned by Massoumeh Valanejad, who is one of two owners of Greenfield. Greenfield defaulted on the note in 2010. On 31 March 2010, Capital sent Greenfield a letter declaring a default and

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accelerating the terms of the loan. Greenfield did not pay the balance of \$870,902.84. As a result, Capital initiated foreclosure proceedings against the encumbered properties. Before the foreclosure sale could proceed, Iris filed for Chapter 11 bankruptcy, which stayed the foreclosure proceedings. The United States Bankruptcy Court for the Eastern District of North Carolina entered a Chapter 11 Plan that required Iris to make full payment on or before 5 January 2013. Iris failed to do so.

On 8 March 2013, Capital sold Greenfield's debt to defendant. Defendant re-opened foreclosure proceedings and demanded payment of \$971,670.03 in order for Iris to redeem the property and cancel the deed of trust. On 26 March 2013, plaintiff filed a complaint in Wake County Superior Court seeking an injunction to prohibit the foreclosure sale and a declaratory judgment on the "payoff on the Note secured by the Deed of Trust." The trial court issued a temporary restraining order halting foreclosure proceedings until it could hold a hearing.

On 28 June 2013, the trial court entered its declaratory judgment. It made a number of findings of fact and concluded that the "pay-off amount that Iris must pay to Five Wins to redeem the Property and cancel the Deed of Trust is \$894,711.25 as of 6 May 2013" It further concluded that interest would accrue at \$314.08 per day while Iris would "receive credit for payments in the amount of \$356.45 every day until pay-off by Iris, or Foreclosure by Five Wins." It therefore decreed:

The pay-off amount that Iris must pay to Five Wins to redeem the Property and cancel the Deed of Trust is \$894,711.25 as of 6 May 2013, which includes, in the discretion of the Court, "attorneys' fees" of \$43,640.92, with that amount decreasing by \$42.37 each day until pay-off by Iris, or foreclosure by Five Wins[.]

The trial court also permitted Five Wins to move forward with its foreclosure sale, which it did. At the foreclosure sale, Five Wins bid \$875,000.00, but WA Venture, LLC made an upset bid of \$918,750.00. WA Venture then assigned its upset bid to Five Wins. On 27 August 2013, the trustee of the encumbered property filed a "Final Report and Account of Foreclosure Sale" (original in all caps), which reported various disbursements, including \$856,286.33 as the "Right of Redemption pursuant to Declaratory Judgment" and \$24,105.61 as going toward the "Secured Obligation(s) (partial)". Under the disbursement made by the trustee, the entire \$917,750.00 was used, leaving no surplus.

Plaintiff believed that these disbursements contravened the declaratory judgment. So, it noticed a hearing, without filing an accompanying

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motion, and requested that the trial court “clarify” its previous declaratory judgment. The trial court rejected defendant’s argument that the prior judgment did not control because “there is a distinction between ‘the payoff on the Promissory Note’ and the ‘amount to redeem real property[.]’” It entered an order on 18 September 2013, wherein it concluded that its prior judgment determined the

amount of the payoff on the Promissory Note applicable to Plaintiff, and after payment by the Substitute Trustee of the amounts set out therein, along with the three (3) expenses set out in paragraph 16 above [relating to expenses incurred after the judgment was entered], there should have been surplus funds totaling \$24,291.24 to be paid to Plaintiff as owner of the Collateral.

The trial court therefore ordered the trustee to pay \$24,291.24 to plaintiff as surplus from the foreclosure sale. Defendant filed written notice of appeal on 25 September 2013.

II. Distribution of Foreclosure Sale Assets

Defendant argues that the trial court invaded the sole province of the trustee by determining that the trustee had misapplied the funds from the foreclosure sale. We conclude that defendant lost the opportunity to challenge the trial court’s decision when it failed to appeal the declaratory judgment, which determined the “pay-off” amount and the amount of attorney’s fees.

Any error in the trial court’s 18 September 2013 order necessarily follows from the declaratory judgment. In that order, the trial court determined the attorney’s fees and “pay-off amount” necessary to exercise the equitable remedy of redemption. Contrary to defendant’s argument, the law of this state has long been that the right of redemption allows a mortgagor “to regain complete title by paying the mortgage debt, plus any interests and any costs accrued.” James A. Webster, Jr., *Webster’s North Carolina Real Estate Law*, § 13.05[1] (6th ed. 2013). The redemption amount thus *is* the amount of indebtedness. So, when the trial court concluded that the “pay-off” amount was \$894,711.25, it was ruling on the amount of the indebtedness, including accrued interest and fees. Indeed, in the September order, the trial court specifically concluded that the June judgment “was intended to set out the amount of the payoff on the Promissory Note applicable to Plaintiff . . .” Further, in the prior judgment, the trial court calculated the amount of interest that would accrue each day and the credit for payments that Iris would receive until “pay-off by Iris, or foreclosure by Five Wins.”

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Once these amounts were set, any sale price in excess of that amount, deducting other reasonable expenses incurred after entry of the order and contemplated by that order, must be considered surplus. *See* N.C. Gen. Stat. § 45-21.31(b) (2013) (“Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) *shall* be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto.” (emphasis added)). Once the trial court determined the amount of the payoff and the per diem sums of interest which would accrue until paid in full, and that determination was not appealed, it was the law of the case and the trustee was required to follow the court’s order.

Although we have said that disbursements of proceeds from a foreclosure sale “are within the sole province of the trustee[,]” in none of the cases cited by defendant has there been a prior order from a declaratory judgment action determining the relevant amounts. *In re Foreclosure of Deed of Trust Executed by Ferrell Bros. Farm, Inc.*, 118 N.C. App. 458, 461, 455 S.E.2d 676, 678 (1995). “When an order is not appealed, it becomes[] the law of the case, and other . . . judges [are] without authority to enter orders to the contrary.” *Kelly v. Kelly*, 167 N.C. App. 437, 443, 606 S.E.2d 364, 369 (2004). Certainly if one superior court judge cannot overrule another, the trustee of a property in foreclosure lacks authority to overrule a superior court judge. *See Cato v. Crown Financial, Ltd.*, 131 N.C. App. 683, 686, 508 S.E.2d 822, 824 (1998) (holding that a prior final judgment was the law of the case, which the debtor corporation’s receiver could not reduce or modify), *disc. rev. denied*, 350 N.C. 593, 536 S.E.2d 836 (1999). Even assuming that the declaratory judgment exceeded the trial court’s authority, defendant cannot now challenge it.¹ Defendant does not argue that the trial court was without jurisdiction to enter the declaratory judgment, so any argument to that effect has been abandoned. N.C.R. App. P. 28(a). Therefore, we affirm the trial court’s 18 September 2013 order enforcing its unappealed declaratory judgment.

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

1. Plaintiff also argues that the trial court erred in concluding that defendant was entitled to any attorney’s fees, but plaintiff similarly failed to appeal the declaratory judgment, so we have no jurisdiction to address that issue.

KEESEEE v. HAMILTON

[235 N.C. App. 315 (2014)]

BRIAN KEESEEE, PLAINTIFF

v.

JOHN HAMILTON, DEFENDANT

No. COA13-1039

Filed 5 August 2014

1. Appeal and Error—interlocutory orders and appeals—discovery sanctions—dismissal

A sanctions order that dismissed plaintiff's complaint for not complying with discovery was interlocutory because it left unresolved the question of defendant's entitlement to monetary damages on his counterclaims. However, it was immediately appealable because it affected a substantial right.

2. Jurisdiction—continuing—contempt order—compliance

The trial court had subject matter jurisdiction to preside over telephonic hearings concerning sanctions that took place after a contempt order was issued. The judge's commission was for one day or until business was completed and he had continuing jurisdiction to ensure compliance with the contempt order.

3. Contempt—continuing—discovery sanctions

The trial court did not abuse its discretion by finding that plaintiff was in continuing civil contempt at the time of a show cause hearing concerning discovery violations where plaintiff claimed he could not have been in continuing civil contempt because the contempt order had not yet been issued. Even assuming an inaccurate use of the phrase, plaintiff did not offer a persuasive argument for vacating the sanctions order, given the abundant evidence supporting the court's decision to impose sanctions on plaintiff.

Appeal by plaintiff from order entered 18 March 2013 by Judge W. Russell Duke, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 6 February 2014.

The Lea Schultz Law Firm, P.C., by James W. Lea, III, for plaintiff-appellant.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Jennifer J. Bennett, for defendant-appellee.

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[235 N.C. App. 315 (2014)]

DAVIS, Judge.

Brian Keesee (“Plaintiff”) appeals from the trial court’s order sanctioning him for his failure to respond to discovery requests and to comply with prior court orders. After careful review, we affirm.

Factual Background

Plaintiff and Kimberly Marie Keesee (“Mrs. Keesee”) were married on 3 February 2003 and separated on 17 October 2009.¹ At some point while Plaintiff and Mrs. Keesee were still married, John Hamilton (“Defendant”) allegedly initiated an affair with Mrs. Keesee that ultimately resulted in the Keesees’ separation.

On 24 November 2009, Plaintiff filed an action against Defendant in Brunswick County Superior Court stating claims for alienation of affection, criminal conversation, and intentional infliction of emotional distress. On 24 February 2010, Defendant filed an answer denying the material allegations of the complaint and asserting counterclaims against Plaintiff for electronic eavesdropping, invasion of privacy, defamation, and defamation *per se*.

Defendant served his first set of interrogatories and request for documents on Plaintiff on 1 March 2010. Plaintiff submitted his responses and objections on 11 May 2010. Defendant filed a motion to compel on 4 June 2010 and an amended motion to compel on 14 September 2010.

Defendant’s motion to compel was heard on 14 February 2011. On 16 March 2011, the Honorable James F. Ammons, Jr. entered an order (“the Discovery Order”) providing, in pertinent part, as follows:

2. Within ten (10) days, Plaintiff is to provide to counsel for the Defendant full and complete responses to the following discovery requests:
 - a. Plaintiff shall produce or tender for inspection a complete response to Defendant’s requests for production #4 and 5, which shall comprise copies of any and all audio, video, digital or other form of recording containing the communications or activities, or featuring in any way, the Defendant . . . and/or [Mrs. Keesee], as well as any and all transcripts, photographs, or other

1. This is the date of separation alleged by Plaintiff in his complaint. Defendant’s counterclaim lists the date of separation as 10 October 2010.

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documents referencing or recounting the content of the above-described audio, video, or other recordings;

c. [sic] Plaintiff shall produce or tender for inspection a complete response to Defendant's request for production number 11, which shall comprise copies of any and all documents, including but not limited to statements, invoices, quotes, written or electronic correspondence, brochures, photographs, reports or other information from a private investigator or any individual with whom Plaintiff consulted regarding the monitoring and recording of the activities of [Defendant] and/or [Mrs. Keesee.]

Plaintiff filed a notice of appeal as to the Discovery Order and a motion for a stay on 15 April 2011. On 20 December 2012, Defendant filed a motion to dismiss Plaintiff's appeal of the Discovery Order based on his failure to timely prosecute the appeal. Plaintiff's appeal was dismissed by the Honorable Reuben F. Young by order entered 11 January 2013.

Defendant also filed a motion to show cause, asking the trial court to hold Plaintiff in contempt for his failure to comply with the Discovery Order. On 4 March 2013, Defendant's show cause motion came on for hearing before the Honorable W. Russell Duke, Jr. During Plaintiff's testimony at the show cause hearing, he admitted that he was in possession of audio recordings, videotapes, and written reports from a private investigator — all of which were encompassed within the Discovery Order but had not been provided by him. He testified that he did not know where these materials were specifically located but conceded that he had failed to make any efforts to comply with the Discovery Order — which had been in effect for almost two years at the time of Plaintiff's testimony — by attempting to locate them.

On 8 March 2013, the trial court entered an order ("the Contempt Order") finding Plaintiff in willful civil contempt and remanded him to the custody of the Brunswick County Sheriff's Office. In the Contempt Order, the trial court made the following relevant findings of fact:

4. The Plaintiff has failed to abide by and to obey the Discovery Order issued by this Superior Court.
5. The Plaintiff appeared before this Court and failed to show cause as to why he should not be held in civil contempt of the Discovery Order.

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6. The Plaintiff has the materials ordered to be produced in his possession, custody or control.
7. The Plaintiff has made no demonstrable efforts to gather and produce the recordings and other documents, materials and information subject to the Discovery Order and has not sought to obtain any help to download electronically stored information or recordings.
8. The Plaintiff has failed and refused to produce the materials subject to the Discovery Order.

Based on these findings of fact, the trial court ordered, in pertinent part, as follows:

4. Prior to his release from custody, and as a condition of purging his contempt, the Plaintiff is ordered to fully and completely produce the following:
 - a. Plaintiff shall produce or tender for inspection a complete response to Defendant's requests for production #4 and 5, which shall comprise copies of any and all audio, video, digital or other form of recording containing the communications or activities, or featuring in any way, the Defendant . . . and/or [Mrs. Keesee], as well as any and all transcripts, photographs, or other documents referencing or recounting the content of the above-described audio, video, digital or other recordings;
 - b. Plaintiff shall produce or tender for inspection a complete response to Defendant's request for production number 11, which shall comprise copies of any and all documents, including but not limited to statements, invoices, quotes, written or electronic correspondence, brochures, photographs, reports of other information from a private investigator or any individual with whom Plaintiff consulted regarding the monitoring and recording of the activities and communications of [Defendant] and/or [Mrs. Keesee.]
5. The Plaintiff is ordered to pay to the Defendant the additional sum of \$1,928.50, for the reasonable attorney's fees incurred by the Defendant in prosecuting the Defendant's Motion to show cause . . . prior to the Plaintiff's release from custody as an additional condition of purging his contempt; and

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6. The Court retains jurisdiction over the parties and the subject matter of this action to enforce compliance with this order.

After the entry of the Contempt Order, counsel for Plaintiff began tendering certain documents to Defendant's counsel in an effort to purge Plaintiff of civil contempt. Defendant's counsel prepared a detailed list of the deficiencies in Plaintiff's responses and provided a copy to both Plaintiff's counsel and the trial court. Around this same time, it became apparent that a number of assertions previously made by Plaintiff in his testimony at the show cause hearing had been false. Records tendered from the private investigative firm hired by Plaintiff and affidavits from eyewitnesses were noted to directly conflict with Plaintiff's prior testimony in several respects.

First, Plaintiff, while admitting to having purchased surveillance equipment via the Internet, had denied placing a GPS tracking device on Defendant's vehicle. However, records from Plaintiff's private investigator showed that such a device had, in fact, been placed on Defendant's vehicle.

Second, Plaintiff had denied that he ever made written transcripts of audio recordings of Defendant and Mrs. Keese. However, counsel for Plaintiff began producing such transcripts within 48 hours of the show cause hearing at which Plaintiff testified that they did not exist.

Third, when asked if he had ever brought any recordings or transcripts from his surveillance of Defendant and Mrs. Keese with him to prior court proceedings, Plaintiff had denied ever doing so. However, several witnesses submitted affidavits stating that they had witnessed Plaintiff with such materials while in court.

On 8 March 2013 and again on 12 March 2013, Judge Duke presided over telephonic hearings arranged by Plaintiff's counsel in connection with Plaintiff's request that the trial court release him from jail so that he could assist in the efforts to bring himself into compliance with the Contempt Order. During these hearings, counsel for Defendant requested that the trial court sanction Plaintiff pursuant to Rule 37 of the North Carolina Rules of Civil Procedure for his continuing failure to provide adequate discovery responses and his failure to comply with prior court orders requiring him to produce responsive documents as a condition of purging his contempt.

The trial court denied Plaintiff's request for relief and entered an order ("the Sanctions Order") on 18 March 2013 sanctioning Plaintiff by

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dismissing his complaint with prejudice and entering a default judgment in favor of Defendant on his counterclaims. Plaintiff gave timely notice of appeal to this Court.

Analysis**I. Interlocutory Appeal**

[1] We first note that the Sanctions Order left unresolved the question of Defendant's entitlement to monetary damages on his counterclaims. Therefore, the order is interlocutory. *See Duncan v. Duncan*, 102 N.C. App. 107, 111, 401 S.E.2d 398, 400 (1991) (holding that appeal of default judgment ordering subsequent hearing on damages was interlocutory).

An interlocutory order may be appealed, however, if the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment. *Guilford Cty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 529, 473 S.E.2d 640, 641 (1996). This Court has previously held that "where a party is found in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable since it affects a substantial right under [N.C. Gen. Stat. §] 1-277 . . ." *Cochran v. Cochran*, 93 N.C. App. 574, 576, 378 S.E.2d 580, 581 (1989). As such, we have jurisdiction over Plaintiff's appeal.

II. Subject Matter Jurisdiction of Trial Court Over Telephonic Hearings

[2] Plaintiff's first argument on appeal is that the trial court lacked subject matter jurisdiction to preside over the telephonic hearings that took place on 8 March and 12 March 2013 and to enter the subsequent Sanctions Order. We disagree.

We review questions of subject matter jurisdiction *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Pursuant to the *de novo* standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Trivette v. Yount*, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011) (citation, quotation marks, and brackets omitted), *aff'd in part, rev'd in part on other grounds, and remanded*, 366 N.C. 303, 735 S.E.2d 306 (2012).

Judge Duke was commissioned to preside over a special session of Brunswick County Superior Court at the time Defendant's motion to show cause was heard on 4 March 2013. The parties do not dispute that, by its terms, his commission was to last for one day or "until the business is completed." Four days after the 4 March 2013 hearing, Judge

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Duke entered the Contempt Order, concluding as a matter of law that “[t]he Court has jurisdiction of the subject matter of this action and over the person of the Plaintiff” and that “[t]he Court retains jurisdiction over the parties and the subject matter of this action to enforce compliance with this order.”

Plaintiff argues that although Judge Duke possessed jurisdiction to enter the Contempt Order, he lacked jurisdiction to take any action thereafter. Plaintiff contends that once Judge Duke entered the Contempt Order, there was no further “business” left for him to conduct, and that, as such, the limited jurisdiction conferred upon him by his commission had ended.

In rejecting Plaintiff’s argument, we find instructive our decision in *Hockaday v. Lee*, 124 N.C. App. 425, 477 S.E.2d 82 (1996). In *Hockaday*, this Court held that a superior court judge commissioned to preside over a special session of superior court set to last for two weeks or “until the business of the court was completed” possessed jurisdiction to enter an order taxing costs and fees outside of the two-week period because the business of the court was not completed until the execution of the judgment and the settling of the costs. *Id.* at 428, 477 S.E.2d at 84 (quotation marks and brackets omitted).

Similarly, in the present case, Judge Duke’s commission granted him authority to preside over a special session of Brunswick County Superior Court for one day “or until the business [was] completed.” Judge Duke’s jurisdiction did not expire simply by virtue of him entering the Contempt Order because enforcement issues related to that order could — and, in fact, did — arise, leaving the business of that session of court unfinished.

The present case is distinguishable from *In re Delk*, 103 N.C. App. 659, 406 S.E.2d 601 (1991), which Plaintiff cites in support of his jurisdictional argument. In *Delk*, we held that an out-of-district judge assigned to preside over a special session of superior court did not have jurisdiction to enter a show cause order. *Id.* at 661, 406 S.E.2d at 602. However, the trial judge in *Delk* entered the show cause order *prior* to the commencement of the special session. *Id.* Here, conversely, the telephonic hearings and Sanctions Order took place *after* the special session had begun and while the business of the court was not yet finished.

Thus, Judge Duke had jurisdiction to preside over the telephonic hearings and to subsequently enter the Sanctions Order based upon his continuing jurisdiction to ensure compliance with the Contempt Order. Accordingly, Plaintiff’s argument on this issue is overruled.

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III. Sanctions Order

[3] Plaintiff's final argument is that the Sanctions Order contains erroneous findings and must therefore be vacated. We disagree.

Rule 37 authorizes a trial court to impose sanctions, including the entry of a default judgment, against a party who fails to comply with a discovery order. N.C.R. Civ. P. 37(b)(2),(d). "Sanctions [imposed] under Rule 37 are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.*; see *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 246, 618 S.E.2d 819, 826 (2005) (holding that trial court's decision to impose sanctions may only be overturned "if there is no record which indicates that [a] defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred"), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006).

Although a trial court must consider lesser sanctions prior to dismissing an action with prejudice for failure to comply with discovery, it is not required to expressly list and reject each lesser sanction that it considered in its order. *Badillo v. Cunningham*, 177 N.C. App. 732, 735, 629 S.E.2d 909, 911, *aff'd per curiam*, 361 N.C. 112, 637 S.E.2d 538 (2006). Here, in Finding of Fact 12 of the Sanctions Order, Judge Duke stated that he had considered lesser sanctions before deciding to impose the sanctions contained therein.

Plaintiff argues that the trial court abused its discretion by finding in the Sanctions Order that Plaintiff was in *continuing* civil contempt at the time of the show cause hearing. Specifically, he points to a provision in the Sanctions Order stating that the trial court made its findings of facts after

having reviewed the file in this matter, having presided over the hearing on Defendant's Motion to Show Cause in which the Plaintiff was found to be in *continuing civil contempt* for failure to make discovery, having presided over a telephonic hearing on March 8, 2013, having presided over a telephonic hearing on March 12, 2013, and having otherwise heard arguments of counsel for both parties and being fully advised in this matter[.]

(Emphasis added.) Plaintiff claims he could not have been in continuing civil contempt at the time of the show cause hearing because the

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Contempt Order had not yet been issued. Plaintiff argues that this mischaracterization may have influenced the trial court's decision to impose more stringent sanctions against him.

Pursuant to N.C. Gen. Stat. § 5A-21, failure to comply with a court order constitutes continuing civil contempt as long as

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order;
- (2a) The noncompliance by the person to whom the order is directed is willful; and
- (3) The person to whom the order is directed is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2013).

At the hearing on Defendant's motion to show cause and as memorialized in the ensuing Contempt Order, the trial court made the requisite findings necessary to hold Plaintiff in continuing civil contempt. Specifically, the trial court found, in pertinent part, as follows:

4. The Plaintiff has failed to abide by and to obey the Discovery Order issued by this Superior Court.
5. The Plaintiff appeared before this Court and failed to show cause as to why he should not be held in civil contempt of the Discovery Order.
6. The Plaintiff has the materials ordered to be produced in his possession, custody or control.
7. The Plaintiff has made no demonstrable efforts to gather and produce the recordings and other documents, materials and information subject to the Discovery Order and has not sought to obtain any help to download electronically stored information or recordings.
8. The Plaintiff has failed and refused to produce the materials subject to the Discovery Order.
9. The Discovery Order remains in force.
10. The purpose of the Discovery Order may still be served by compliance with the same.

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11. The Plaintiff's noncompliance with the performance obligations of the Discovery Order is willful.

12. The Plaintiff is able to comply with the performance obligations of the Discovery Order or is able to take reasonable measures that would enable him to comply with the performance obligations of the Discovery Order.

Thus, the trial court did not err by using the phrase "continuing civil contempt" when it entered the Sanctions Order. However, even assuming *arguendo* that the trial court's use of the phrase was inaccurate, Plaintiff has failed to offer any persuasive argument as to why any such error would require that the Sanctions Order be vacated as an abuse of the trial court's discretion — given the abundant evidence supporting the court's decision to impose sanctions on Plaintiff.

Finally, Plaintiff alleges that Finding of Fact 6 of the Sanctions Order constitutes an erroneous finding upon which the trial court relied in determining the sanctions to be imposed. Specifically, Plaintiff refers to the fact that Finding of Fact 6 mistakenly states that Plaintiff testified at a hearing on 6 March 2013 that he had not made written transcripts of the audio recordings of Defendant and Mrs. Keesee when, in actuality, this testimony took place at a hearing held on 4 March 2013. Plaintiff argues that the trial court's use of the incorrect hearing date in the Sanctions Order rose to the level of prejudicial error because it "contributed to Judge Duke's ultimate decision to impose the harshest sanctions possible."

Nothing in the Sanctions Order, however, supports a conclusion that Judge Duke considered the precise date on which Plaintiff gave this testimony to be relevant in his decision-making process regarding the imposition of sanctions. Rather, as the Sanctions Order makes clear, the imposition of the sanctions at issue was based on the fact that Plaintiff engaged in conduct such as producing transcripts that he had previously testified did not exist. Given the wealth of evidence to support the entry of the Sanctions Order, we conclude that any clerical error as to the date of the hearing was not material to the trial court's decision to impose sanctions and, therefore, any such error was harmless.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges CALABRIA and STROUD concur.

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[235 N.C. App. 325 (2014)]

DOMINICK MAZZEO, PLAINTIFF
v.
CITY OF CHARLOTTE, DEFENDANT

No. COA13-1388

Filed 5 August 2014

1. Police Officers—employment termination—civil service hearing—oath retaken after consolidation

In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department, competent evidence existed to support a finding of fact that plaintiff was “re-sworn” as an officer with the Charlotte-Mecklenburg Police Department Airport Division, so that he was entitled to a civil service hearing. Both oaths were identical and both oaths were administered by the Deputy City Clerk of the City of Charlotte.

2. Police Officers—employment termination—civil service hearing—not a probationary officer after consolidation—finding supported by evidence

In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department (CMPD), the trial court’s finding that any changes in the nature and character of the plaintiff’s employment were not substantive enough to result in his being classified as a probationary employee (and losing his right to a civil service appeal) was supported by evidence that plaintiff had been to some degree under the supervision of the CMPD since shortly after his initial hire.

3. Police Officers—employment termination civil service hearing—not a probationary officer after consolidation—conclusion—supported by finding

In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department, the evidence supported the trial court’s findings of fact which supported its conclusion that any changes in the nature and character of the plaintiff’s employment were not substantive enough to result in his being classified as a probationary employee (and losing his right to a civil service appeal).

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[235 N.C. App. 325 (2014)]

Appeal by defendant from order entered 29 August 2013 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 April 2014.

Office of the City Attorney, by Catherine L. Cooper and Mark H. Newbold, for defendant-appellant.

Goodman, Carr, Laughrun, Levine & Greene, PLLC, by Miles S. Levine, for plaintiff-appellee.

DAVIS, Judge.

Defendant City of Charlotte (“the City”) appeals from the trial court’s 29 August 2013 order finding that Dominick Mazzeo (“Plaintiff”) is entitled to a Civil Service Board hearing in connection with the termination of his employment with the City. After careful review, we affirm.

Factual Background

Plaintiff was hired by the City on 30 May 2007 and assigned to the Charlotte Douglas International Airport (“CDIA”) as an Airport Safety Officer (“ASO”). On 19 June 2007, after receiving his general certification in law enforcement, he was administered the oath of office and sworn in as a law enforcement officer. Throughout his employment, Plaintiff received annual Performance Reviews and Development assessments (“PRDs”). These PRDs were reviewed and signed by officers of the Charlotte-Mecklenburg Police Department (“CMPD”).

Effective on 15 December 2012, the City Manager ordered the consolidation of all airport safety officers into the CMPD. As a result, Plaintiff was transferred to the CMPD, retaining his “rank, salary, longevity, and relevant benefits.” Because of the consolidation, the City required Plaintiff to take a new oath of office as an officer with the CMPD, which he did on 4 January 2013.

On 14 June 2013, Plaintiff received a letter from the CMPD terminating his employment for a “work rule violation.” He was then given a packet of information describing his appeal rights to the Charlotte-Mecklenburg Civil Service Board (“the Board”). Section 4.61 of the Charlotte City Charter provides members of the City’s police and fire departments who have been employed for longer than 12 months with the right to have the Board review various types of personnel actions, including termination.

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On 18 June 2013, Plaintiff appealed his termination to Rodney Monroe, the CMPD's Chief of Police. His appeal was denied by letter dated 25 June 2013. Plaintiff then attempted to file an appeal to the Board asking the Board to review his termination. However, he was told that he did not, in fact, qualify for civil service protection because he was a probationary CMPD employee on the date of his termination due to the fact that he did not become a sworn officer of the CMPD until the December 2012 consolidation.

Plaintiff's attorney subsequently filed a written request on 26 June 2013 asking the Board to review his termination. In an undated letter, an attorney for the City explained its rationale for classifying Plaintiff as a probationary employee:

It is true that Mr. Mazzeo became an employee of the City of Charlotte in 2007. As a City employee who worked at the airport as an airport safety officer, he was not entitled to Civil Service protection under the City's Charter provisions. Rather, like all other non-sworn City employees whose employment is terminated, he was entitled to a pre-termination hearing and also to file a grievance through the City's grievance process.

In December of 2012, through a functional consolidation, all airport safety officer positions were moved from the City's aviation department to the police department. Following that consolidation, [Plaintiff] became a "sworn officer" . . . entitled to the protection of the Civil Service Board in December, 2012, when his application for hire to the police department was approved by the Board. Accordingly, on the date of his termination, June 14, 2013, he was still subject to the police department's 12-month probationary period and considered an "exception" . . . to Civil Service provisions requiring terminated officers be given a hearing before the Board.

Plaintiff filed a complaint in Mecklenburg County Superior Court seeking a declaration that he was entitled to a hearing before the Board regarding his termination. The case was heard by the trial court without a jury on 26 August 2013. On 29 August 2013, the trial court issued an order determining that Plaintiff was entitled to a hearing before the Board. The City filed a timely notice of appeal.

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Analysis

Section 4.61 of the Charlotte City Charter provides, in pertinent part, as follows:

(f) Definitions. The terms “officer or employee” or “officer,” as used in this Article, shall mean sworn officers with regard to the police department and shall mean uniformed personnel with regard to the fire department.

....

(j) Appeal hearings. Upon receipt of a citation for termination from either chief or upon receipt of notice of appeal for a suspension from any civil service covered police officer or firefighter, the Board shall hold a hearing not less than 15 days nor more than 30 days from the date the notice of appeal, or the citation, is received by the Board. . . .

....

(t) Exceptions. The provisions of this Article pertaining to civil service coverage of officers and employees of the fire and police departments . . . shall not apply to an officer of the police or fire department until he or she has been an officer of the respective department for at least 12 months. During such 12-months’ probationary period, he or she shall be subject to discharge by the chief of such department under rules promulgated with respect thereto, such rules to be approved by the [City] Council.

2000 N.C. Sess. Laws ch. 4, § 4.61.

“[W]here a declaratory judgment action is heard without a jury and the trial court resolves issues of fact, the court’s findings of fact are conclusive on appeal if supported by competent evidence in the record, even if there exists evidence to the contrary, and a judgment supported by such findings will be affirmed.” *First Union Nat’l Bank v. Ingold*, 136 N.C. App. 262, 264, 523 S.E.2d 725, 727 (1999). The trial court’s conclusions of law are reviewable *de novo* on appeal. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

In its 29 August 2013 order, the trial court made the following findings of fact:

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1. That the Plaintiff, Dominick Mazzeo, is a citizen and resident of Mecklenburg County and was hired as a Charlotte Douglas International Airport (CDIA) Officer on May 30, 2007.
2. That the Plaintiff's badge number at the time of his hire was 3636.
3. That on December 15, 2012, the Charlotte Mecklenburg Police Department acquired, merged and consolidated all Charlotte Douglas International Airport (CDIA) Safety Officers into one organization to be controlled by the Charlotte Mecklenburg Police Department, part of the City of Charlotte[.]
4. That at the time of the consolidation and thereafter, the Plaintiff retained his same rank, badge number, employee identification number and salary.
5. That the City of Charlotte required all CDIA Officers to be "re-sworn."
6. That the Plaintiff was re-sworn as an officer with the Charlotte Mecklenburg Police Department-Airport Division on January 4, 2013.
7. That a review of the oath of office by the undersigned finds the oaths are identical pre-take over and post-take over by the City of Charlotte.
8. That at the time of his employment with the CDIA Police, the Plaintiff had his Performance Review and Development (PRD) signed off by supervisors of the Charlotte Mecklenburg Police Department, even though at the time he was under the ultimate authority of the Aviation Department with respect to hiring, discipline and firing.
9. From and after the time of the merger, when the Plaintiff became an employee of the Charlotte Mecklenburg Police Department, he was under the authority of the Charlotte Mecklenburg Police Department Chain of Command for all purposes and required to follow Charlotte Mecklenburg Police Department policies and procedures.

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10. That the Plaintiff received a letter on June 13 [sic], 2013 from the Charlotte Mecklenburg Police Department terminating his employment from the Charlotte Mecklenburg Police Department-Airport Division.

11. That the Plaintiff appealed his termination to Charlotte Mecklenburg Police Department Chief Rodney Monroe requesting a Civil Service Hearing by the Charlotte-Mecklenburg Civil Service Board.

12. That the Plaintiff was informed that he was not entitled to an appeal to the Civil Service Board as he was a “probationary employee.”

13. That under the City Charter, to be considered for a Civil Service Board hearing, an officer must be “non probationary.”

14. That the merger by the City of Charlotte-Charlotte Mecklenburg Police Department and the Charlotte Douglas International Airport Police Division did not substantially change the nature and character of the Plaintiff’s employment with the City of Charlotte.

The trial court then made the following conclusion of law:

... [T]hat, notwithstanding the provisions of the Charlotte City Charter Section 4.61 (t), any changes in the nature and character of the Plaintiff’s employment with the City of Charlotte after the departmental consolidation on December 15, 2012, were not substantive enough to have resulted in his being classified as a probationary employee with the Charlotte Mecklenburg Police Department, and he therefore should be and is entitled to a hearing before the City of Charlotte Civil Service Board regarding his termination from the Charlotte Mecklenburg Police Department-Airport Division.

Defendant challenges only findings of fact 6 and 14. Thus, findings of fact 1-5 and 7-13 are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.”).

[1] Specifically, Defendant challenges the portion of finding of fact 6 stating that Plaintiff was “re-sworn as an officer with the

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Charlotte-Mecklenburg Police Department Airport Division on January 4, 2013,” claiming that this finding is unsupported by the evidence. The City argues that there was “no evidence before the Court indicating that the second oath somehow ‘endowed’ [an] Airport Safety Officer with civil service protection in 2007.” The City further argues the record lacks “credible evidence that Plaintiff was ever sworn in as an Airport Safety Officer with the Charlotte-Mecklenburg Police Department until January, 2013.”

We are satisfied that competent evidence existed to support finding of fact 6. Plaintiff presented as exhibits during the hearing both the oath of office he was administered on 19 June 2007 and the oath administered on 4 January 2013. The content of both oaths is identical:

I, Dominick Mazzeo, do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States and the Constitution and laws of North Carolina not inconsistent therewith; that I will be alert and vigilant to enforce the criminal laws of this State; that I will not be influenced in any matter on account of personal bias or prejudice; that I will faithfully and impartially execute the duties of my office as a law enforcement officer according to the best of my skill, abilities, and judgment; so help me, God.

Moreover, on both occasions the oath was administered by the Deputy City Clerk of the City of Charlotte. Thus, competent evidence exists to support the trial court’s finding of fact 6.

[2] Defendant next challenges finding of fact 14 which states that “the merger by the City of Charlotte-Charlotte Mecklenburg Police Department and the Charlotte Douglas International Airport Police Division did not substantially change the nature and character of the Plaintiff’s employment with the City of Charlotte.” While the City argues that “[o]nly after December 15, 2012 did all Airport Safety Officers, including Plaintiff, come under the chain of command of the CMPD,” the trial court’s finding is supported by evidence of record that Plaintiff had been — at least to some degree — under the supervision of the CMPD since shortly after his initial hire date in 2007. During the hearing, Plaintiff introduced into evidence his PRDs, dating back to June 2008, which were signed by ranking officers of the CMPD, including a captain with the CMPD.

Finding of fact 14 is further supported by evidence of a five percent (5%) contribution made by the City to Plaintiff’s “Police ER 401k” that

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is reflected on both (1) Plaintiff's *pre*-consolidation pay stub for the pay period beginning on 17 November 2012 and ending on 23 November 2012; and (2) Plaintiff's *post*-consolidation pay stub for the pay period beginning on 15 December 2012 and ending on 21 December 2012. Pursuant to N.C. Gen. Stat. § 143-166.50(e)¹, the City contributes five percent (5%) of sworn officers' bi-weekly earnings to the "Police ER 401k." The fact that the City's five percent (5%) contribution was made to Plaintiff both prior to and after the consolidation supports the trial court's finding that the merger did not materially alter Plaintiff's employment status with the City. Similarly, evidence was presented that Plaintiff was enrolled in the "Police Retirement Plan" both before and after the consolidation.

Furthermore, as noted by the trial court in finding of fact 4 (which the City does not challenge on appeal), after the consolidation, Plaintiff retained his same rank, badge number, employee identification number, and salary. Thus, finding of fact 14 is supported by competent evidence.

[3] Finally, Defendant challenges the trial court's conclusion of law "that . . . any changes in the nature and character of the Plaintiff's employment with the City of Charlotte after the departmental consolidation on December 15, 2012, were not substantive enough to have resulted in his being classified as a probationary employee with the Charlotte Mecklenburg Police Department" The City argues that "[o]nly after December 15, 2012 did all Airport Safety Officers, including Plaintiff, come under the chain of command of the CMPD . . . [such that] their one year probationary period set out in the Charter started on December 15, 2012."

We hold that the trial court's conclusion of law is supported by its findings of fact. The trial court's findings established that: (1) Plaintiff retained his same rank, badge number, employee identification number, and salary after the consolidation; (2) Plaintiff took identical oaths of office both upon his initial hiring in 2007 and after the consolidation in 2012; (3) from the time he was originally assigned to the CDIA until the date of his dismissal, Plaintiff had his PRDs reviewed and signed by supervising officers of the CMPD; and (4) the City contributed to his law enforcement 401k account in the same amount both before and after the consolidation.

1. N.C. Gen. Stat. § 143-166.50(e) states, in pertinent part, that "on and after July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to five percent (5%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers."

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Therefore, we conclude that the trial court's findings of fact support its legal conclusion that any changes in Plaintiff's employment as a result of the departmental consolidation were insufficient to classify Plaintiff as a "probationary" employee for purposes of §4.61(t) of the Charlotte City Charter. As such, the trial court did not err in determining that Plaintiff is entitled to a hearing before the Civil Service Board with regard to his termination.

Conclusion

For the reasons stated above, the trial court's 29 August 2013 order is affirmed.

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

KAREN B. NEVITT IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF DAVID R. ROBOTHAM AND AS BENEFICIARY OF THE ROBOTHAM REAL PROPERTY TRUST AS SET FORTH UNDER ARTICLE VI OF THE ROBOTHAM REVOCABLE TRUST AGREEMENT DATED AUGUST 2, 2011, PLAINTIFF-APPELLEE

v.

RICHARD GORDON ROBOTHAM; WADE A. NEVITT; RICHARD H. JAGER; STEPHEN P. SHEFFIELD, JR.; STEPHEN L. KELTNER; SARA SHEFFIELD; GRIFFIN E. NEVITT; JACK K. HUMPHREY, JR.; ROBERT E. NEVITT; WILMINGTON CHAPTER OF THE COLONIAL DAMES HISTORICAL SOCIETY; SABRINA BURNETT; JACK K. HUMPHREY, JR., AS TRUSTEE OF THE ROBOTHAM REAL PROPERTY TRUST, DEFENDANTS

No. COA13-1232

Filed 5 August 2014

Trusts—by declaration—real property—declaratory judgment—no requirement to execute deed transferring title to self

The trial court erred in a declaratory judgment action by concluding that a trust was never funded with the pertinent real property. When considered together, the trust agreement and the deed created a valid trust by declaration, which included the real property. There was no requirement that decedent execute a deed transferring title from himself to himself as trustee. The documents satisfied N.C.G.S. § 36C-4-401(2) and served as a declaration by the owner of property that the owner held identifiable property as trustee.

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[235 N.C. App. 333 (2014)]

Appeal by Defendant Sabrina Burnett from judgment and order entered 3 June 2013 by Judge Phyllis M. Gorham in Superior Court, New Hanover County. Heard in the Court of Appeals 4 March 2014.

Lawrence S. Boehling for Plaintiff-Appellee Karen Nevitt.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III and Paige E. Inman, for Defendant-Appellant Sabrina Burnett.

McGEE, Judge.

Karen B. Nevitt (“Plaintiff”), in her capacity as Executrix of the Estate of David R. Robotham and as Beneficiary of the David R. Robotham Revocable Trust, filed a complaint on 11 July 2012 against Richard Gordon Robotham, Wade A. Nevitt, Richard H. Jager, Stephen P. Sheffield, Jr., Stephen L. Keltner, Sara Sheffield, Griffin E. Nevitt, Jack K. Humphrey, Jr., Robert E. Nevitt, the Wilmington Chapter of the Colonial Dames Historical Society, Sabrina Burnett (“Ms. Burnett”), and Jack K. Humphrey, Jr., as Trustee of the Robotham Revocable Trust (together, “Defendants”). In her complaint, Plaintiff requested declaratory judgment concerning whether a certain deed was valid.

Plaintiff attached as Exhibit A to her complaint, an agreement titled “David R. Robotham Revocable Trust Agreement” (hereinafter “trust agreement”). The trust agreement, dated 2 August 2011, was “by and between” David R. Robotham as Grantor and David R. Robotham as Trustee. The trust agreement provided that, upon the “incapacity or death” of David R. Robotham (“Mr. Robotham”), “[his] friend, Jack K. Humphrey, Jr., shall serve as sole Trustee hereunder[.]” The trust agreement was immediately funded with ten dollars by the express terms of the trust agreement. In the trust agreement, Mr. Robotham clearly stated that the purpose of the trust was to hold his “personal residence located at 225 Seacrest Drive, Wrightsville Beach, North Carolina for [Ms. Burnett’s] remaining lifetime should she survive me. It is my intent and desire that [Ms. Burnett] be provided with uninterrupted and exclusive use and enjoyment of the residence for as long as she shall live.”

Plaintiff also attached as Exhibit B to her complaint, a document titled “North Carolina General Warranty Deed” (“the deed”). The deed, also dated 2 August 2011, identified “David R. Robotham” as Grantor and purported to convey the real property at 225 Seacrest Drive in fee simple to Grantee “David R. Robotham, Trustee [for the] David R. Robotham Revocable Trust.”

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Ms. Burnett filed an answer to Plaintiff's complaint in which she denied certain allegations, and asserted various counterclaims against Jack K. Humphrey, Jr. Jack K. Humphrey, Jr. filed an answer to Plaintiff's complaint in which he stated: "I [] Accept the Request of the Declaratory Judgment by Karen Nevitt," and he answered "Accept" to all allegations in Plaintiff's complaint.

The trial court held a hearing on 1 May 2013 and heard testimony from Richard Inlow ("Mr. Inlow"), Jack K. Humphrey, Jr., Ms. Burnett, Stephen Sheffield, Karen Nevitt, and Mark Sheffield. Mr. Inlow testified that he was the attorney who, at Mr. Robotham's request, had prepared the trust agreement and the deed. Mr. Inlow agreed that, at the same time Mr. Robotham executed the trust agreement, Mr. Robotham "signed a deed to transfer in the [real] property from himself to the trust[.]" Mr. Inlow testified that he had told Mr. Robotham that "we were not done until we funded the trust and we had to do that with a bank account. We'll record a deed at the register of deed's office."

The trial court entered judgment and order on 3 June 2013 and made the following finding of fact number 18: "At the time of the death of David R. Robotham, the David R. Robotham Revocable Trust Agreement dated August 2, 2011 and the Robotham Real Property Trust were funded with a bank account only." The trial court concluded that: "The deed from grantor David R. Robotham remained within the control of the grantor David R. Robotham until his death, *was never delivered so was not a legally valid deed.*" (Emphasis added). Ms. Burnett appeals.

I. Standard of Review

"The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal.'" *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (citations omitted). "However, the trial court's conclusions of law are reviewable *de novo*.'" *Id.* (citation omitted).

II. Analysis

First, "[t]he exchanges between the parties covering the subject in controversy are in writing, and manifest no ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact. Their construction is, therefore, for the [C]ourt." *Atkinson v. Atkinson*, 225 N.C. 120, 124-25, 33 S.E.2d 666, 670 (1945). It "is a fundamental rule

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that, when interpreting . . . trust instruments, courts must give effect to the intent of the . . . settlor, so long as such intent does not conflict with the demands of law and public policy.’” *First Charter Bank v. Am. Children’s Home*, 203 N.C. App. 574, 586, 692 S.E.2d 457, 466 (2010) (citations omitted).

Ms. Burnett correctly observes that the present case “does not fit the fact pattern” of previous cases regarding “delivery of a deed from a grantor to a third-party grantee[.]” The rule that “‘the creation of a trust must involve a conveyance of property,’” *Bissette v. Harrod*, ___ N.C. App. ___, ___, 738 S.E.2d 792, 799 (2013) (quoting *In re Estate of Washburn*, 158 N.C. App. 457, 461, 581 S.E.2d 148, 151 (2003)), does not contemplate the situation in the present case, in which the settlor and the trustee are the same individual. In *Washburn*, this Court has acknowledged that a conveyance is not required where settlor and trustee are the same individual. *Id.* “‘Aside from the situation in which a settlor of a trust declares himself or herself trustee, separation of the legal and equitable interests must come about through a transfer of the trust property to the trustee.’” *Id.* (citation and footnotes omitted).

It is well-established that, “[i]n creating an *inter vivos* trust, the creator [settlor] and the trustee may be one and the same person.” *Ridge v. Bright*, 244 N.C. 345, 348, 93 S.E.2d 607, 610 (1956). Given that the settlor of a trust and the trustee are the same person in the present case, the trial court’s reliance on delivery of the document labeled “North Carolina General Warranty Deed” is misplaced. There are multiple ways in which a valid trust may be created, for example:

- (1) Transfer of property by a settlor to a person as trustee during the settlor’s lifetime or by will or other disposition taking effect upon the settlor’s death[; or]
- (2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law.

N.C. Gen. Stat. § 36C-4-401 (2013), *see also* Restatement (Second) of Trusts § 17 (1959), Restatement (Third) of Trusts § 10(c) (2003) (a trust may be created by “a declaration by an owner of property that he or she holds that property as trustee for one or more persons”). In order to create a valid trust by *transfer*, under section (1) above, title to the trust property has to be transferred by settlor to the designated trustee(s) to hold for the benefit of the intended beneficiary. *Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 287, 547 S.E.2d 62, 66 (2001).

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However, transfer of the trust property is not a requirement for creating a valid *inter vivos* trust by *declaration* – under section (2) above. Because the settlor of a trust and the trustee may be the same person, it follows that “where the settlor and the trustee are the same person, no transfer of legal title is required, since the trustee already holds legal title.” 76 Am. Jur. 2d Trusts § 46. The Restatement Second provides illustrations of ways a valid *inter vivos* trust may be created by declaration:

- a. Declaration of trust. If the owner of property declares himself trustee of the property, a trust may be created without a transfer of title to the property.

Illustration:

1. A, the owner of a bond, declares himself trustee of the bond for designated beneficiaries. A is trustee of the bond for the beneficiaries.

So also, the owner of property can create a trust by executing an instrument conveying the property to himself as trustee. In such a case there is not in fact a transfer of legal title to the property, since he already has legal title to it, but the instrument is as effective as if he had simply declared himself trustee.

2. A, the owner of Blackacre, executes, acknowledges and records a deed conveying Blackacre to A as trustee for a designated beneficiary. A is trustee of Blackacre for the beneficiary.

Restatement (Second) of Trusts § 17, Comments (1959). This method of creating a valid trust — declaration of trust — is recognized in *Ridge*, 244 N.C. at 349, 93 S.E.2d at 611 (“when the owner of personal property, in creating a trust therein, constitutes himself as trustee, it is not necessary as between himself and the beneficiary that he should part with the possession of the property”); *see also* N.C. Gen. Stat. § 36C-4-401(2) (2013) (a trust may be created by “[d]eclaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law”); Wiggins Wills & Administration of Estates in N.C. § 23:3 (4th ed.) (“Where the property owner declares himself trustee, delivery is not required.”).

“The principle that a trust may be created by a declaration contained in a separate instrument, or in several instruments, other than the deed conveying the legal title, provided they have sufficient relation

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to each other and construed together evidence such trust, is generally recognized.” *Peele v. LeRoy*, 222 N.C. 123, 125, 22 S.E.2d 244, 246 (1942). “‘Express’ . . . trusts are those trusts intentionally created by the direct and positive act of the settlor, by some writing, deed, or will, or an oral declaration[.]” *Williams v. Mullen*, 31 N.C. App. 41, 45, 228 S.E.2d 512, 514 (1976) (quoting 76 Am. Jur. 2d, Trusts § 15, p. 263).

In the present case, the record on appeal presents two documents relating to the Robotham Real Property Trust, both duly executed in front of a notary: (1) the trust agreement and (2) the deed. “Where there are two or more instruments relating to a trust, the instruments should be construed together to effectuate the settlor’s intent.” *Davenport v. Central Carolina Bank & Tr. Co.*, 161 N.C. App. 666, 672, 589 S.E.2d 367, 370 (2003) (citations omitted); *see also Smith v. Smith*, 249 N.C. 669, 675, 107 S.E.2d 530, 534 (1959) (“All instruments executed at the same time and relating to the same subject may be construed together in order to effectuate the intention.”).

A “Statement of Grantor’s Intent” appeared in Section 6.3 of the trust agreement, and set out Mr. Robotham’s purpose for creating the trust:

I am creating and funding this trust in an effort to grant **Sabrina Burnett** exclusive use and enjoyment of my personal residence located at 225 Seacrest Drive, Wrightsville Beach, North Carolina for her remaining lifetime should she survive me. It is my intent and desire that **Sabrina Burnett** be provided with uninterrupted and exclusive use and enjoyment of the residence for as long as she shall live. Furthermore, it is my desire that the trust bear the costs associated with maintaining the home, including but not limited to, the costs associated with taxes, insurance, association fees (if any), pest control, assessments and necessary repairs. I have attempted to fund the trust with sufficient working capital to cover the expenses associated with the residence for a reasonable period of time. (Emphasis in original).

The deed contained the following declaration that Mr. Robotham held the real property at 225 Seacrest Drive as trustee:

WITNESSETH, that the Grantor, David R. Robotham, also known as David Ray Robotham (the “Settlor”), for a valuable consideration (non-taxable consideration) paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey

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onto the Grantee [David R. Robotham, Trustee, David R. Robotham Revocable Trust] in fee simple, all that certain lot or parcel of land situated in the Town of Wrightsville Beach, County of New Hanover, State of North Carolina, and being more particularly described as follows:[.]

When the trust agreement and the deed quoted above are considered in conjunction with each other, Mr. Robotham's intent concerning the real property at issue in this case is clear. Mr. Robotham desired that Ms. Burnett have exclusive use and enjoyment of Mr. Robotham's residence for Ms. Burnett's remaining lifetime, and intended to hold the property as trustee for the use and enjoyment of Ms. Burnett, as beneficiary. Because we have two contemporaneously executed documents relating to the trust, we do not decide whether either document, when considered alone, would have been sufficient to create a valid *inter vivos* trust by declaration.

We must consider the conditional language in N.C. Gen. Stat. § 36C-4-401(2) (emphasis added):

A trust may be created by . . . :

. . . .

Declaration by the owner of property that the owner holds identifiable property as trustee *unless the transfer of title of that property is otherwise required by law.*

We must determine whether our law required additional action, such as recordation, to effectuate Mr. Robotham's intent to include the real property in the trust. The North Carolina Comment to N.C. Gen. Stat. § 36C-4-401 states:

Paragraph (2) [of N.C.G.S. § 36C-4-401] differs from the Uniform Trust Code by adding the phrase "unless the transfer of title of such property is otherwise required by law." The Uniform Trust Code adopts the common law rule that a declaration of trust can be funded by declaring assets to be held in trust without executing separate documents of transfer. See the Official Comment to this section and authorities cited. *North Carolina courts have not addressed this issue.* The drafters concluded that the *best practice* is to require compliance with state law provisions governing the transfer of title in order to eliminate questions regarding ownership of property and

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provide better protection of the rights of third parties and trust beneficiaries.

N.C. Gen. Stat. § 36C-4-401, Comments (emphasis added).

In the present case, Mr. Robotham made no promise to convey legal title to Ms. Burnett. Rather, the record plainly shows that Mr. Robotham retained legal title to the real property at issue. It is well-established that the trustee holds legal title to trust property. *In re Estate of Pope*, 192 N.C. App. 321, 335, 666 S.E.2d 140, 150 (2008) (“There is no dispute that legal title to the trust assets was lodged in the trustees.”); *see also* Strong’s N.C. Index 4th, Trusts and Trustees, § 236 (2008). The documents at issue in the present case did not convey, as in transfer or deliver, legal title, because Mr. Robotham already held legal title to the real property. Legal title remained vested in Mr. Robotham. We can locate no North Carolina law requiring the transfer of property when creating an *inter vivos* revocable trust by declaration. Other jurisdictions clearly do not require any transfer of title when creating a trust by declaration. *See Taliaferro v. Taliaferro*, 260 Kan. 573, 580, 921 P.2d 803, 809 (1996) (“Where, as here, the settlor and the trustee are the same person, no transfer of legal title is required, since the trustee already holds legal title.”); *Estate of Heggstad*, 16 Cal. App. 4th 943, 950, 20 Cal. Rptr. 2d 433, 436 (1993) (“authorities provide abundant support for our conclusion that a written declaration of trust by the owner of real property, in which he names himself trustee, is sufficient to create a trust in that property, and that the law does not require a separate deed transferring the property to the trust”). Transfer is, of course, required when the settlor and trustee are not the same person. N.C.G.S. § 36C-4-401(1).

We hold that the trial court erred in concluding: “The trust was never funded with the real property[.]” When considered together, the trust agreement and the deed created a valid trust by declaration, which included the real property. There was not a requirement that Mr. Robotham execute a deed transferring title from himself to himself as trustee. We reverse and remand to the trial court for further action in accordance with this opinion.

In addition, assuming *arguendo* transfer of the real property was required, that transfer would still have to have been from Mr. Robotham to Mr. Robotham, as trustee. The deed was executed by Mr. Robotham, as grantor, to himself, as “Trustee, David R. Robotham Revocable Trust.” This deed was executed by Mr. Robotham simultaneously with the trust agreement. Once these documents were executed by Mr. Robotham, the David R. Robotham Revocable Trust was created, and the real property

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became part of the corpus of that trust. There is nothing in these two documents evincing any intent on the part of Mr. Robotham to prevent the trust from taking immediate effect, or prevent title to the real property from being immediately delivered to himself, as trustee. Mr. Robotham's intent is clear from the documents, and manifests "no ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact." *Atkinson*, 225 N.C. at 124-25, 33 S.E.2d at 670.

Because there exists no ambiguity in the documents, it is irrelevant that Mr. Inlow informed Mr. Robotham after the fact that the transaction would not be "done" until the deed was recorded. At that point, the revocable trust had already been created, the real property was already part of the corpus, and Mr. Robotham was already trustee. Had Mr. Robotham wanted to revoke the trust, he could have done so, but any misunderstanding about the nature of the trust, its corpus, or Mr. Robotham's authority under the trust, could not alter the nature of the trust itself.

"A conveyance of land can only be by deed." *New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 683, 131 S.E.2d 425, 427 (1969) (citation omitted). "The word 'deed' ordinarily denotes an instrument in writing, signed, sealed, and delivered by the grantor, whereby an interest in realty is transferred from the grantor to the grantee." *Gifford v. Linnell*, 157 N.C. App. 530, 532, 579 S.E.2d 440, 442 (2008) (citation omitted). Recordation of the deed was not required to effect transfer of title in this instance, even assuming transfer of title between Mr. Robotham and Mr. Robotham as trustee was required, or possible, in the creation of a trust by declaration. *Washburn*, 158 N.C. App. at 461, 581 S.E.2d at 151 ("'Aside from the situation in which a settlor of a trust declares himself or herself trustee, separation of the legal and equitable interests must come about through a transfer of the trust property to the trustee.'" (citation and footnotes omitted); see also *Ridge*, 244 N.C. at 349, 93 S.E.2d at 611 ("when the owner of personal property, in creating a trust therein, constitutes himself as trustee, it is not necessary as between himself and the beneficiary that he should part with the possession of the property").

Therefore, we hold that the trial court erred in concluding: "The deed from David R. Robotham to David R. Robotham, Trustee, David R. Robotham Revocable Trust . . . was not delivered and is not a valid deed." Though we do not believe a properly executed deed was required to create the trust, we hold the deed was properly executed and delivered, and is therefore valid. Though the deed has not been recorded, that

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does not impact its validity in this instance. Lack of recordation only denies the deed the protections that recordation affords.

We hold that, in the present case, the documents satisfied N.C.G.S. § 36C-4-401(2) and served as a declaration “by the owner of property that the owner h[eld] identifiable property as trustee[.]” N.C.G.S. § 36C-4-401(2). Accordingly, the trial court’s order is reversed.

Reversed.

Judges STEELMAN and ERVIN concur.

KIMBERLY PURCELL, EMPLOYEE, PLAINTIFF

v.

FRIDAY STAFFING, EMPLOYER, ZURICH NORTH AMERICAN, CARRIER (GALLAGHER BASSETT SERVICES, THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA13-1252

Filed 5 August 2014

1. Workers’ Compensation—denial of benefits—prior undisclosed work-related injury increased risk

The Industrial Commission did not err by denying plaintiff’s claim for workers’ compensation benefits. There was sufficient evidence that plaintiff’s prior undisclosed work-related injury increased the risk of sustaining her present injury.

2. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial

Although plaintiff alternatively argued that N.C.G.S. § 97-12.1, as applied in this case, was an unconstitutional ex post facto law, defendant failed to raise this argument at trial. Even if this issue were preserved, it would be without merit since N.C.G.S. § 97-12.1 does not involve a criminal offense.

Appeal by plaintiff from opinion and award entered 21 June 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 March 2014.

Ganly & Ramer, by Thomas F. Ramer, for plaintiff-appellant.

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McAngus, Goudelock & Courie, P.L.L.C., by Sally B. Moran and Colin E. Cronin, for defendants-appellees.

GEER, Judge.

Plaintiff Kimberly Purcell appeals an opinion and award of the Industrial Commission denying her claim for workers' compensation benefits. Plaintiff contends on appeal that the Commission improperly applied N.C. Gen. Stat. § 97-12.1 (2013) when it concluded that the injury she suffered while working for defendant Friday Staffing was causally connected to a previous work-related injury that plaintiff concealed when she applied for employment with Friday Staffing. However, we agree with the Commission's interpretation of N.C. Gen. Stat. § 97-12.1 that a causal connection exists between a willfully misrepresented prior condition and a present injury if the former increases the risk of the latter. Because there was sufficient evidence in this case that plaintiff's prior undisclosed work-related injury increased the risk of sustaining her present injury, we affirm.

Facts

On 6 August 1999, plaintiff suffered an injury to her back while working for Quality Assured Enterprises. A lumbar MRI revealed a disc protrusion in her lower back at the L5-S1 vertebrae and disc degeneration at the L4-5 vertebrae. Dr. Stewart J. Harley treated plaintiff for those injuries, in part with a surgical procedure called a microdiscectomy, and he initially restricted plaintiff from doing any work that involved bending, stooping, lifting, or twisting. Following a functional capacity evaluation ("FCE") and after reaching maximum medical improvement, plaintiff was given a seven percent partial disability rating to her back. Dr. Harley prescribed physical therapy and eventually relaxed plaintiff's lifting restrictions to permit lifting of no more than 20 pounds, although he encouraged her to find sedentary-level work.

As a result of this injury, plaintiff filed a workers' compensation claim against Quality Assured. Plaintiff and Quality Assured signed a Compromise Settlement Agreement on 24 January 2002 for an amount of \$50,000.00 to be paid to plaintiff. Part of the Settlement Agreement stated, "IT IS UNDERSTOOD by and between the respective parties hereto that party of the second part's condition as the result of her accident may be permanent and may be progressive, that recovery therefrom is uncertain and indefinite" The Settlement Agreement also

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noted that plaintiff did not dispute that she had a seven percent permanent partial impairment to her back.

Subsequently, plaintiff worked in different jobs for various companies. She continued to receive treatment for back pain through her primary care providers. In 2007, plaintiff complained of low back pain radiating down her left leg and weakness in her left leg. After her primary care provider recommended a lumbar MRI and physical therapy, plaintiff told her, on 20 July 2007, that she had a disc bulge at L4-5. Her doctor diagnosed degenerative disc disease, wrote a prescription for a TENS unit, and recommended physical therapy. On 23 January 2008, plaintiff again complained of back pain, told her primary care provider that she was seeing a neurosurgeon, and said she might need back surgery.

On 28 May 2010, plaintiff applied for employment with defendant Friday Staffing, a company that fills the labor needs of a clientele of employers with potential employees it hires. The employment application included two pertinent questionnaires: a “Friday Essential Functions Questionnaire” and a “Medical History Questionnaire.” On the Essential Functions questionnaire, plaintiff indicated that she could engage in the following activities: lifting more than 50 pounds; carrying more than 50 pounds; frequent bending, pulling, pushing, kneeling, squatting, and twisting; standing for long periods; and sitting for long periods. In the Medical History portion of the application, plaintiff indicated that she had never filed a workers’ compensation insurance claim, suffered any injury or undergone surgery, or received treatment or consultation about back pain or possible back injuries.

To complete her application, plaintiff signed the following verification: “I hereby state all information on this Work History Record is true and factual. . . . I understand that any false statement may result in my immediate dismissal. . . . I understand that Friday Services is an Employer-At-Will, and that my employment can be terminated at any time, with or without reason and with or without cause.”

Friday Staffing matched plaintiff with Continental Teves, a company that manufactures automotive parts. Friday Staffing then conducted an in-person interview in which plaintiff verified her ability to lift and carry up to and over 50 pounds and that she had not filed any workers’ compensation claims previously, did not have any condition that might limit her ability to perform any work assignment, had not had any prior injury or surgery, and had not ever received treatment or consultation for back pain or a back injury.

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Plaintiff initially began working for Continental Teves on 2 June 2010 as an assembly line worker. The job profile for the position included occasional walking and stooping; frequent overhead reaching; pushing 40- to 45-pound baskets of automotive parts; lifting automotive parts from baskets to the assembly line; and carrying boxes of automotive parts from a staging area to a table.

At Continental, plaintiff worked a CO2 line and a drum line. With regard to the CO2 line, the Commission found that plaintiff was required to constantly lift trailer arms weighing between 20 and 25 pounds. In April 2011, plaintiff was working 80 percent of her time on the CO2 line, “which involved the more strenuous work of the lines Plaintiff worked.” At approximately 1:00 a.m. on 18 July 2011, while at work, plaintiff re-injured her back. A subsequent MRI revealed a “new large focal disk [sic] extrusion at L5-S1 compressing the descending right S1 nerve root.” Since the 18 July 2011 injury, plaintiff has been out of work.

Plaintiff completed an undated Form 18, “Notice of Accident to Employer and Claim of Employee,” and on 17 November 2011, defendant Friday Staffing filed a Form 61 denying liability for plaintiff’s claim. The deputy commissioner denied her claim in an opinion and award filed 9 November 2012. Plaintiff appealed to the Full Commission.

The Full Commission filed an opinion and award on 21 June 2013, affirming the opinion and award of the deputy commissioner with minor modifications. The Commission concluded that plaintiff’s claim should be denied pursuant to N.C. Gen. Stat. § 97-12.1 on the grounds that at the time plaintiff was hired: “(1) Plaintiff knowingly and willfully made a false representation as to her physical condition; (2) Defendant-Employer relied upon said false representation by Plaintiff, and the reliance was a substantial factor in Defendant-Employer’s decision to hire her; and (3) there was a causal connection between the false representation by Plaintiff and her claimed injury.” Plaintiff timely appealed the Full Commission’s opinion and award to this Court.

Discussion

Our review of a decision of the Industrial Commission “is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law.” *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). “The findings of the Commission are conclusive on appeal when such competent evidence exists[.]” *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). As the

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fact-finding body, “[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)). “[T]he Industrial Commission’s conclusions of law are reviewable *de novo*.” *Johnson v. Herbie’s Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003).

[1] Plaintiff challenges the Full Commission’s interpretation and application of N.C. Gen. Stat. § 97-12.1, which provides:

No compensation shall be allowed under this Article for injury by accident or occupational disease if the employer proves that (i) at the time of hire or in the course of entering into employment, (ii) at the time of receiving notice of the removal of conditions from a conditional offer of employment, or (iii) during the course of a post-offer medical examination:

- (1) The employee knowingly and willfully made a false representation as to the employee’s physical condition;
- (2) The employer relied upon one or more false representations by the employee, and the reliance was a substantial factor in the employer’s decision to hire the employee; and
- (3) There was a causal connection between false representation by the employee and the injury or occupational disease.

Plaintiff does not dispute the Commission’s determination that the first two elements were met, but contends on appeal that the Commission erred in finding a causal connection, the third element. In making this argument, plaintiff appears to contend that defendants must show through expert testimony “that the herniated disc was caused or contributed [to] by the alleged fraud.” Defendants, however, contend that plaintiff has applied the wrong causation standard.

Our appellate courts have not interpreted and applied N.C. Gen. Stat. § 97-12.1 since its enactment in 2011. “Questions of statutory interpretation are questions of law[.] . . . The primary objective of statutory interpretation is to give effect to the intent of the legislature. The plain language of a statute is the primary indicator of legislative intent.”

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First Bank v. S & R Grandview, L.L.C., ___ N.C. App. ___, ___, 755 S.E.2d 393, 394 (2014) (internal citations omitted). “If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will.” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (internal citation and quotation marks omitted).

Statutory language is ambiguous if it is “fairly susceptible of two or more meanings.” *State v. Sherrod*, 191 N.C. App. 776, 778, 663 S.E.2d 470, 472 (2008) (quoting *Abernethy v. Bd. of Comm’rs of Pitt Cnty.*, 169 N.C. 631, 636, 86 S.E. 577 580 (1915)). Because our courts have defined the phrase “causal connection” differently depending on the issues involved, that phrase is ambiguous when included in a statute, at least in the workers’ compensation context. Compare *Chambers v. Transit Mgmt.*, 360 N.C. 609, 618, 619, 636 S.E.2d 553, 559 (2006) (explaining that in order to prove “causal connection” between specific traumatic event and injury, plaintiff must show that injury was “the direct result of a specific traumatic incident” (quoting N.C. Gen. Stat. § 97-2(6) (2005)) with *Morrison v. Burlington Indus.*, 304 N.C. 1, 39, 43, 282 S.E.2d 458, 481, 484 (1981) (requiring for “causal connection” a showing that “occupational conditions . . . significantly contributed to the [occupational] disease’s development”), and *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977) (holding decedent’s death did not arise out of her employment due to lack of “causal connection” between work and death since nature of work did not increase risk she would be slain by criminal act).

When confronted with ambiguous statutory language, we may determine the intent of the legislature by “‘considering [the statute’s] legislative history and the circumstances of its enactment.’” *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 164, 731 S.E.2d 800, 815 (2012) (quoting *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 460, 665 S.E.2d 449, 451 (2008)). Also, when construing an amendment, “[i]n determining legislative intent, we may ‘assume that the legislature is aware of any judicial construction of a statute.’” *Blackmon v. N.C. Dep’t of Corr.*, 343 N.C. 259, 265, 470 S.E.2d 8, 11 (1996) (quoting *Watson v. N.C. Real Estate Comm’n*, 87 N.C. App. 637, 648, 362 S.E.2d 294, 301 (1987)).

Prior to the enactment of N.C. Gen. Stat. § 97-12.1, a majority opinion in *Freeman v. J.L. Rothrock*, 189 N.C. App. 31, 36, 657 S.E.2d 389, 392-93 (2008), *rev’d per curiam sub nom. Estate of Freeman v. J.L. Rothrock, Inc.*, 363 N.C. 249, 676 S.E.2d 46 (2009), attempted to adopt the “Larson test”:

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Pursuant to the *Larson* test, an employee may be barred from recovering workers' compensation benefits as a result of a false statement at the time of hiring when the employer proves:

(1) The employee must have knowingly and wilfully made a false representation as to his or her physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

3 *Larson's Workers' Compensation Law* § 66.04 (2006) (footnotes omitted).

Although the *Freeman* majority opinion found "no specific statutory basis for the *Larson* test," it nonetheless reasoned that common law doctrines provided implicit authority because "in construing the provisions of this State's Workers' Compensation Act, common law rules . . . remain in full force" *Id.* at 37, 38, 657 S.E.2d at 393, 394 (quoting *Tise v. Yates Constr. Co.*, 122 N.C. App. 582, 587, 471 S.E.2d 102, 106 (1996)). This Court, after applying the *Larson* test, reversed the Industrial Commission's award of compensation to Mr. Freeman on the grounds that he had made misrepresentations to his employer regarding a prior back injury and workers' compensation claim. *Id.* at 48, 657 S.E.2d at 399.

Judge Wynn, however, dissented, noting: "Not only have we previously rejected the *Larson* test, there is no legislative authority for this Court to adopt such a test." 189 N.C. App. at 49, 657 S.E.2d at 400 (Wynn, J., dissenting). The Supreme Court reversed "for the reasons stated in the dissenting opinion[.]" *Estate of Freeman*, 363 N.C. at 250, 676 S.E.2d at 46.

In short, just two years preceding the enactment of N.C. Gen. Stat. § 97-12.1, the Supreme Court reversed *Freeman* because this Court had "no legislative authority" to read the *Larson* test into the Workers' Compensation Act. 189 N.C. App. at 49, 657 S.E.2d at 400 (Wynn, J., dissenting). Then, when the legislature enacted N.C. Gen. Stat. § 97-12.1, it used language identical to the *Larson* test as set out and applied in this Court's opinion in *Freeman*. We presume that the legislature was aware of this Court's decision in *Freeman* applying the *Larson* test and, under these circumstances, we conclude that the legislature intended to adopt the *Larson* test as *Freeman* initially expressed and applied it.

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[235 N.C. App. 342 (2014)]

In *Freeman*, this Court determined that the requirement of “a causal connection” between the plaintiff’s misrepresentations and his earlier back injury presented “the issue . . . whether his undisclosed medical condition increased his risk of injury.” 189 N.C. App. at 45, 46, 657 S.E.2d at 398, 399. We, therefore, hold that when requiring a “causal connection” to satisfy the third element of N.C. Gen. Stat. § 97-12.1, the legislature intended that a defendant show that a plaintiff’s undisclosed or misrepresented injury, condition, or occupational disease increased the risk of the subsequent injury or disease.

Here plaintiff concedes, and Dr. Harley’s unchallenged expert medical testimony indicates, that plaintiff’s prior back problems, which she concealed from defendant employer, increased the potential for her 2011 back injury if she violated her lifting restrictions. Nonetheless, plaintiff argues that because there was “no evidence as to the exact parts being lifted” while plaintiff worked with Continental, the Commission could not have concluded that plaintiff violated her lifting restrictions, and thus there could be no causal connection between her prior and recent back injuries. We disagree.

The Commission found that plaintiff developed severe right-sided pain and numbness on 18 July 2011 “as she was having to constantly twist and bend over to pick up trailer arms from the pallet.” In addition, the Commission found that the trailer arms weighed between 20 and 25 pounds, a weight in excess of her work restrictions. Although plaintiff argues that there was no evidence that she violated her work restrictions of lifting no more than 20 pounds, the Commission’s finding regarding the weight of the trailer arms was supported by plaintiff’s own testimony that the trailer arms weighed “about twenty – maybe twenty-five pounds.”

The Commission was entitled to find based on plaintiff’s testimony that she was exceeding her work restrictions when she injured her back. That finding, in conjunction with Dr. Harley’s unchallenged expert testimony that plaintiff was at an increased risk of injury if she exceeded her work restrictions, supported the Commission’s conclusion that a causal connection existed between plaintiff’s false representation and her 18 July 2011 back injury. We, therefore, hold that the Commission did not err in denying plaintiff’s claim for worker’s compensation based on N.C. Gen. Stat. § 97-12.1. *See Freeman*, 189 N.C. App. at 47-48, 657 S.E.2d at 399 (holding that causal connection was established by expert testimony that plaintiff’s undisclosed medical condition increased his risk of back injury at issue).

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[2] Plaintiff alternatively argues that N.C. Gen. Stat. § 97-12.1, as applied in this case, is an unconstitutional ex post facto law. However, “[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal.” *In re Cline*, ___ N.C. App. ___, ___, 749 S.E.2d 91, 102 (2013) (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)), *disc. review denied*, ___ N.C. ___, 753 S.E.2d 781 (2014). “Since this argument was not raised [below], it is not properly before us on appeal.” *Id.* at ___, 749 S.E.2d at 102.

However, even if this issue were before us, it would be without merit since N.C. Gen. Stat. § 97-12.1 does not involve a criminal offense. *See State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (explaining that ex post facto implicates four types of laws: “‘1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*[.]’” (quoting *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39, 110 S. Ct. 2715, 2719 (1990))). Accordingly, we affirm the Commission’s opinion and award.

Affirmed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

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[235 N.C. App. 351 (2014)]

STATE OF NORTH CAROLINA

v.

ROBERT ALFONZO CLAPP

No. COA13-785

Filed 5 August 2014

1. Sexual Offenses—sexual offense against 13, 14, or 15 year old child—taking indecent liberties with student while acting as first responder—requested jury instruction—law of accident

The trial court did not err in committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder case by failing to give defendant's requested jury instruction concerning the law of accident. There was a complete absence of any evidence tending to show that defendant digitally penetrated the victim's vagina with his fingers in an accidental manner. Further, any error was rendered harmless by the trial court's subsequent decision to instruct the jury with respect to the issue of accident.

2. Evidence—character—working well with children—no unnatural lust or desire to have sexual relations with children

A de novo review revealed that the trial court did not err in committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder case by refusing to allow a former member of the coaching staff to testify that defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. The excluded testimony did not tend to show the existence or non-existence of a pertinent character trait.

3. Evidence—character—honesty—trustworthiness—substantive evidence

A de novo review revealed that the trial court did not err in committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder case by refusing to instruct the jury that it could consider evidence concerning defendant's character for honesty and trustworthiness as substantive evidence of his guilt or innocence. A person exhibiting those character traits was not necessarily less likely than others to commit these crimes.

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[235 N.C. App. 351 (2014)]

Appeal by defendant from judgments entered 5 February 2013 by Judge Shannon Joseph in Alamance County Superior Court. Heard in the Court of Appeals 6 January 2014.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for Defendant.

ERVIN, Judge.

Defendant Robert Alfonzo Clapp appeals from judgments entered based upon his convictions for committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder. On appeal, Defendant argues that the trial court erred by refusing to instruct the jury concerning the law of accident, precluding Defendant from eliciting evidence tending to show that Defendant did not have an unnatural lust or sexual interest in children, and refusing to instruct the jury concerning the use of evidence tending to show Defendant's character for honesty and trustworthiness for substantive purposes. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

On 23 March 2011, H.D.¹ was a fifteen-year-old freshman at Walter Williams High School. At that time, Defendant served as a first responder at Walter Williams. Individuals acting as first responders, who had previously been known as athletic trainers, were supposed to be present at practices in order to assess injuries, determine if additional medical services were needed, and assist student athletes in addressing problems associated with actual and potential injuries by performing such functions as taping ankles, stretching sore muscles, and providing ice. The compensation that Defendant received was provided by funds supplied to the Alamance County schools and the Walter Williams booster club.

1. H.D. will be referred to throughout the remainder of this opinion as Hailey, a pseudonym used for ease of reading and to protect H.D.'s privacy.

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Hailey ran cross country during her freshman year and participated in outdoor track during her freshman and sophomore years. As a result of the fact that she had sustained injuries during both the cross country and track seasons, Hailey sought assistance from Defendant after her cross country and track coach, Brian Smith, told her to be stretched by Defendant. In accordance with that instruction, Defendant periodically stretched Hailey in the field house.

On 23 March 2011, Defendant approached Hailey and inquired about the status of her ankle injury. After Defendant asked Hailey if she wanted to be stretched, Hailey agreed to allow Defendant to stretch her ankle and followed Defendant to the stretching room in the field house. At that time, Hailey was wearing loose running shorts that included built-in underwear and an additional pair of underwear.

After the two of them arrived in the field house, Defendant asked Hailey to remove her socks and shoes and began bending Hailey's foot back and forth. During that process, Defendant asked Hailey if she was still experiencing pain as the result of an earlier hip injury. After Hailey stated that her hip occasionally hurt when she ran, Defendant told Hailey that he would stretch her hip in addition to her ankle.

As Hailey laid on her back, Defendant stretched Hailey's leg in two different ways. In one instance, Defendant lifted Hailey's leg up and pushed it towards her chest using her foot. In the other instance, Defendant had Hailey curve her leg and then pushed the leg to the side. While Defendant performed these stretches, he massaged the inner portion of Hailey's leg at the point where her thigh met her torso using two or three fingers while instructing Hailey to let him know if she experienced pain. As he massaged Hailey's leg, Defendant mentioned that he had to leave shortly in order to sell tickets to the baseball game.

At some point during the leg stretching process, Defendant began massaging an area near her vagina underneath both of the pairs of underwear that Hailey was wearing. As he did so, Defendant inserted his finger or thumb into the area in or around Hailey's vagina on two different occasions. On the first of these occasions, one of Defendant's fingers went to the side of the lips of Hailey's vaginal opening. On the second of these two occasions, Defendant's finger penetrated Hailey's vagina. Defendant made no response after Hailey mumbled, "Watch your fingers." In light of Defendant's silence, Hailey reiterated, "Watch your fingers." Although Defendant removed his fingers from the area around Hailey's vagina after the making of the second statement, he continued to make massaging motions beneath Hailey's underwear.

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The stretching and massaging process involving Defendant and Hailey lasted for approximately thirty to forty-five minutes. During that time, a number of other people entered the field house in order to ask Defendant to provide them with tape or ice. At such times, Defendant would hold brief conversations with the new arrivals while moving his hand from beneath Hailey's underwear to a location on Hailey's thigh or knee. The stretching and massaging process ended when Defendant was summoned to help sell tickets to the baseball game.

After she left the field house, Hailey told her friend, T.H.,² that Defendant had touched her "in places" and moved his fingers beneath her underwear. Although Teresa insisted that the incident be reported to Mr. Smith, Hailey was too embarrassed to tell Mr. Smith what had happened. As a result of the fact that Mr. Smith was involved in a romantic relationship with the mother of another student named R.B.,³ Teresa and Hailey decided to ask Rachel to speak with Mr. Smith instead. After Rachel spoke with Mr. Smith, Hailey told him that Defendant had touched her vagina.

After returning home, Hailey met with investigating officers, told them what had happened, and stated that another girl on the track team, whom she identified as A.B.,⁴ had had a similar experience with Defendant. On the same evening, Detective Steven Reed of the Alamance County Sheriff's Department interviewed Defendant, who denied having engaged in the conduct that Hailey had described and asserted that any contact that he might have had with Hailey's vagina would have been the result of an accident.

In the fall of 2010, Amy was a sixteen-year-old junior at Walter Williams who was experiencing pain as the result of an earlier groin injury. For that reason, Amy asked Defendant to stretch her. At the time that Defendant and Amy went to the field house in order to complete the stretching process, Amy was wearing yoga shorts and underwear. After the two of them reached the field house, Defendant stretched Amy's leg in three different ways. First, Defendant lifted Amy's leg. Secondly, Defendant had Amy push back with her lifted leg while the other leg

2. T.H. will be referred to throughout the remainder of this opinion as Teresa, a pseudonym used for ease of reading and to protect T.H.'s privacy.

3. R.B. will be referred to throughout the remainder of this opinion as Rachel, a pseudonym used for ease of reading and to protect R.B.'s privacy.

4. A.B. will be referred to throughout the remainder of this opinion as Amy, a pseudonym used for ease of reading and to protect A.B.'s privacy.

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remained on the table. Finally, as Amy remained seated, Defendant pushed her knee towards her chest.

While Defendant stretched Amy's leg, he used his hand to massage the muscles in that appendage. As he did so, Defendant's fingers went beneath Amy's underwear. Although Defendant's fingers touched the interior of the lips of Amy's vaginal opening, he did not touch the vicinity of Amy's vagina in any other way. As she left the training room, Amy told a member of the coaching staff that Defendant was a "creep" without describing what he had just done to her. Amy did not report the details of Defendant's conduct to anyone because she was embarrassed about what had happened.

In addition, M.A.⁵ testified that she had participated in soccer and volleyball during her years as a Walter Williams student. After sustaining a groin injury during her senior year, Mandy asked Defendant for advice about stretches and other exercises that she could perform. In response to this request, Defendant told Mandy to meet him in the gym on the following day. At the appointed time, Defendant took Mandy to the athletic training room instead of the gym at a time when no one else was there.

After asking Mandy to lie down on a table, Defendant stretched Mandy's groin by lifting her leg, which was in a bent position, and pushing it to the side. Subsequently, Defendant massaged Mandy's groin area while using some sort of oil. As he did so, Defendant's hands were near Mandy's "bikini line," which she described as the area in which her thigh met her torso. After massaging Mandy's groin for five or ten minutes, Defendant asked Mandy to flip over and lie on her stomach. Once she had done as he requested, Defendant massaged Mandy's lower back and upper buttocks area. As he did this, Defendant's hands went beneath Mandy's underwear.

At approximately the same time that Mandy flipped over in order to lie on her back a second time, a loud bang was heard in the locker room immediately adjacent to the athletic training room. After telling Mandy to stay in the training room, Defendant went outside to check on the origin of the noise. Although Mandy remained in the athletic training room after Defendant's departure, she got dressed. When Defendant returned, Mandy told Defendant that she needed to go to practice and left. Mandy never told anyone about Defendant's conduct due to embarrassment.

5. M.A. will be referred to throughout the remainder of this opinion as Mandy, a pseudonym used for ease of reading and to protect M.A.'s privacy.

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2. Defendant's Evidence

At the time of trial, Defendant was forty-seven years old. Defendant had become involved with the sports program at Walter Williams because his two sons wanted to play football at that institution. For that reason, Defendant began helping the football team in the summer of 2007 by filling the water cooler. After his volunteer efforts were noticed, Defendant was asked to join the staff and help the football team. Subsequently, Defendant worked with the basketball, wrestling, track, lacrosse, and cross country teams as well as the football team.

During the first year in which Defendant was compensated for his services, his title was assistant trainer. However, Defendant's job title was changed to first responder, rather than a trainer, because he did not have a four-year college degree and because the Alamance County school system did not want people who lacked four-year degrees to be referred to as assistant trainers. As a part of the process by which he served as a member of the Walter Williams athletic staff, Defendant attended injury management classes for three consecutive years, which is the maximum amount of training available to individuals in his position. Defendant served as a member of the Walter Williams athletic staff for four consecutive years.

In the autumn, Defendant's primary responsibility was to assist the football team. However, volleyball and cross country students would ask for Defendant's assistance during that time of year as well. Although Defendant assisted student athletes both outdoors and in the field house, he generally elected to take student athletes to the field house if he needed to plug in a massaging instrument or use equipment located in that building. The door to the field house was always propped open with a steel pole in order to prevent the door from slamming on windy days. People freely entered and exited the field house during times when Defendant was assisting student athletes.

On 23 March 2011, Defendant approached a group of students to ask about their injuries. As part of that process, Defendant asked Hailey, who was standing nearby, about her ankle, which had been swollen the previous week. After Hailey indicated that she had hurt her other ankle, Defendant asked Hailey if she wanted him to stretch her ankle. After Hailey agreed, the two of them went to the field house.

Initially, Defendant checked both of Hailey's ankles and twisted and flexed the recently injured ankle for the purpose of determining the extent to which it was tight or loose. Next, Defendant spent five or ten

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minutes stretching Hailey's ankles. As Defendant worked, various individuals entered and exited the field house for the purpose of obtaining ice, wraps, or assistance with various injuries.

After he finished stretching Hailey's ankles, Defendant asked Hailey if she had any other injuries. In response, Hailey stated that an old right hip flexor injury had begun hurting her again. Upon receiving this information, Defendant stretched Hailey's hip by taking her right leg and pushing it towards her chest and across her left leg and body. Although Defendant placed two fingers on Hailey's right hip, Defendant kept those two fingers at the spot at which Hailey said that she was experiencing pain and never moved them from that spot.

In view of the fact that he had been trained to treat both sides of an injured student athlete's body, Defendant stretched Hailey on the left as well as on the right. After stretching the left side of her body, Defendant returned to the right side to eliminate any remaining soreness before stretching Hailey's ankles further. Defendant spent about ten to fifteen minutes stretching each of Hailey's legs. Defendant denied having ever put his fingers or thumbs into Hailey's vagina.

At the time that he received a phone call asking for help in selling baseball tickets, Defendant ended his treatment session with Hailey. As Defendant was exiting the field house, two other female student athletes asked Defendant for assistance. After assisting the two female student athletes, Defendant left to help with the baseball ticket sales.

According to Defendant, Amy was a dedicated runner who would not stop to rest even when advised to do so. Defendant acknowledged that he had assisted Amy on a couple of occasions during her freshman year. During her sophomore year, Amy suffered numerous injuries, including shin splints, a sore knee, and a recurring hip injury. As a result of the fact that Amy had sustained a hip injury, Defendant stretched her leg on occasion and saw her more than once a week. On those occasions, Defendant iced and stretched Amy and used a massaging instrument in order to relieve the effects of muscle strains and pulls. Defendant denied having ever touched Amy's genital area.

According to Defendant, Mandy approached him in order to obtain treatment for a groin injury. Prior to the date upon which this request was made, Defendant had treated Mandy for wrist, shoulder, and groin injuries. As a result of the fact that Mandy was not available for treatment at the time that she made this request, Defendant suggested that the two of them get together on the following day.

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Although Mandy met with Defendant according to the agreed-upon schedule, she was in a hurry to go to practice. Even so, Defendant and Mandy went to the training room beneath the gym, where Defendant treated Mandy using a massage instrument, putting pressure where Mandy's upper thigh met her torso, and applying ice. Mandy did not say anything to him or appear to be upset during the treatment process.

After hearing a heavy weight dropping in another room, Defendant left Mandy alone while he investigated what he had heard. Upon Defendant's return, Mandy stated she needed to get to practice and departed. When Defendant saw Mandy, Mandy thanked Defendant for his assistance. Defendant denied having ever touched Mandy's vagina.

A number of individuals associated with the athletic program at Walter Williams testified that Defendant was trustworthy and had a good reputation for honesty and truthfulness. Similarly, four female students who participated in the Walter Williams athletic program testified that Defendant was honest and truthful, with several of them also asserting that he was trustworthy.

B. Procedural History

On 24 March 2011, a warrant for arrest charging Defendant with committing a statutory sexual offense against a 13, 14, or 15 year old child and committing a sexual offense against Hailey while acting as a coach was issued. On 31 March 2011, a warrant for arrest charging Defendant with taking indecent liberties with Amy while acting as a coach was issued. On 8 August 2011, the Alamance County grand jury returned bills of indictment charging Defendant with committing a statutory sexual offense against a 13, 14, or 15 year old child, committing a sexual offense against Hailey while acting as a coach, and taking indecent liberties with Amy while acting as a coach.

Although the case was called for trial before Judge G. Wayne Abernathy and a jury at the 29 May 2012 criminal session of the Alamance County Superior Court, the jury was unable to reach a unanimous verdict, resulting in the declaration of a mistrial on 5 June 2012. On 11 June 2012, the Alamance County grand jury returned superseding bills of indictment charging Defendant with committing a statutory sexual offense against a 13, 14, or 15 year old child, committing a sexual offense against Hailey while acting as a coach, and committing a sexual offense against Hailey while acting as a first responder, taking indecent liberties with Amy while acting as a coach, and taking indecent liberties with Amy while acting as a first responder.

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The charges against Defendant came on for trial before the trial court and a jury at the 28 January 2013 criminal session of the Alamance County Superior Court. At the beginning of Defendant's second trial, the State announced that it had elected not to proceed against Defendant on the charges alleging that he had committed a sexual offense against Hailey and had taken indecent liberties with Amy while acting as a coach. On 5 February 2013, the jury returned a verdict convicting Defendant of committing a statutory sexual offense against a 13, 14, or 15 year old child, committing a sexual offense against Hailey while acting as a first responder, and taking indecent liberties with Amy while acting as a first responder. At the conclusion of the ensuing sentencing hearing, the trial court arrested judgment in the case in which Defendant was convicted of committing a sexual offense against Hailey while acting as a first responder and entered judgments sentencing Defendant to a term of 192 to 240 months imprisonment based upon his conviction for committing a sexual offense against a child of 13, 14, or 15 years of age and to a consecutive term of 6 to 8 months imprisonment based upon his conviction for taking indecent liberties with Amy while acting as a first responder, with this sentence being suspended and with Defendant being placed on supervised probation for 24 months on the condition that he pay attorney's fees and costs, obtain a mental health assessment, have no contact with Amy, and comply with the usual terms and conditions of probation. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Accident Instruction

[1] In his first challenge to the trial court's judgments, Defendant contends that the trial court erred by failing to instruct the jury concerning the law of accident in accordance with Defendant's request. More specifically, Defendant contends that the trial court was required to submit the accident instruction that he requested given that the record contained evidence that would have supported a jury determination that Defendant had not penetrated Hailey's vagina intentionally. Defendant's contention lacks merit.

1. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own

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judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.'" *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)).

2. Appropriateness of Accident Instruction

"'[W]hen a defendant requests a special instruction which is correct in law and supported by the evidence, the trial court must give the requested instruction, at least in substance.'" *State v. Thompson*, 118 N.C. App. 33, 36, 454 S.E. 2d 271, 273 (quoting *State v. Tidwell*, 112 N.C. App. 770, 773, 436 S.E.2d 922, 924 (1993)), *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995). "If a requested instruction is refused, defendant on appeal must show the proposed instruction was not given in substance, and that substantial evidence supported the omitted instruction," with "[s]ubstantial evidence' [being] that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted) (quoting *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792, *cert. denied*, 315 N.C. 189, 337 S.E.2d 864 (1985), and *State v. Gray*, 337 N.C. 772, 777-78, 448 S.E.2d 794, 798 (1994)).

At the jury instruction conference, Defendant requested that the trial court instruct the jury concerning the law of accident in accordance with N.C.P.J.I. 307.11, which begins by stating that "the defendant asserts the victim's injury was the result of an accident" and indicates that, if the State failed to satisfy the members of the jury that "the injury was in fact accidental, the defendant would not be guilty of any crime even though his acts were responsible for the victim's injury." After the trial court refused to deliver the requested instruction, Defendant made no further request for the delivery of an accident instruction. During its deliberations, the jury inquired about what it should do "if there is proof beyond a reasonable doubt that penetration however slight by an object into the genital opening of a person's body occurred but the State has not proven beyond a reasonable doubt that the penetration was 'willful' and of a sexual nature." In response, the trial court instructed the jury that "[t]he words [']of a sexual nature['] have not appeared in your instruction and you are to apply the instruction that the Court has given you"; that, "[w]ith respect to the willful[ness] question, that word doesn't appear in

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the instructions”; and that “the defendant’s conduct must be intentional and not accidental.”

Although the trial court did refuse to deliver the requested accident instruction based on the inclusion of language in N.C.P.J.I. 307.11 to the effect that “the defendant asserts” that the victim’s injury was accidental in nature, Defendant’s contention that the trial court’s action was not motivated by the absence of sufficient record support for the proposed accident instruction is not consistent with our reading of the record. Instead, we read the record to reflect that the trial court refused to deliver the requested accident instruction given the complete absence of any evidence tending to show that he digitally penetrated Hailey’s vagina with his fingers in an accidental manner, a determination that we believe to have been correct.

At trial, Defendant explicitly denied having inserted his finger into Hailey’s vagina or touching Amy’s genital area in any way. Even so, Defendant asserts that he was entitled to the delivery of an accident instruction given the presence of other evidence contained in the record, including Detective Reed’s statement that Defendant, at one point, said, “I f I did touch her in any way it was innocent and I didn’t mean to do it,” and Hailey’s statement that “I didn’t say anything though because I thought that he wasn’t thinking about it like that or he didn’t realize it and was only doing his job.” In spite of Defendant’s assertions to the contrary, neither of these statements provide any basis for a jury determination that Defendant accidentally penetrated Hailey’s vagina with his finger. On the contrary, Defendant’s statement to Detective Reed was hypothetical in nature and immediately preceded a renewed denial that Hailey’s allegations were true. Similarly, Hailey’s assertion that Defendant might not have known what he was doing amounted to mere speculation about Defendant’s mental state and provides no basis for a determination that Defendant accidentally penetrated Hailey’s vagina with his finger. As a result, we have no hesitancy in concluding that the record simply did not support the delivery of the requested accident instruction.

Moreover, even if the trial court’s decision to refrain from instructing the jury in accordance with N.C.P.J.I. 307.11 was erroneous, any such error was rendered harmless by the trial court’s subsequent decision to instruct the jury with respect to the issue of accident. During its deliberations, the jury asked the trial court, among other things, what it should do if “the State has not proven beyond a reasonable doubt that the penetration was ‘willful’ and of a sexual nature must we still rule guilty in Count One?” Upon reviewing this inquiry, the trial court proposed that the jury be instructed that, in order to support of a finding of guilt, “the

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conduct – defendant’s conduct at issue must be intentional, not accidental.” After Defendant indicated that he did not object to the trial court’s proposal, the trial court instructed the jury that a finding that the defendant acted intentionally, rather than accidentally, was necessary in order for the jury to return a guilty verdict. In view of the fact that the trial court explicitly told the jury during the course of its deliberations that Defendant could not be convicted if his conduct was accidental, we are unable to see how the trial court’s initial refusal to instruct the jury in accordance with N.C.P.J.I. in any way prejudiced Defendant. *State v. Rogers*, 299 N.C. 597, 603-05, 264 S.E.2d 89, 93-94 (1980) (holding that any error in the trial court’s initial jury instructions was cured by a correct instruction given in response to a jury inquiry). As a result, for both of these reasons, Defendant is not entitled to relief from the trial court’s judgments based upon the trial court’s refusal to instruct the jury with respect to the law of accident.

B. Excluded Witness Testimony

[2] Secondly, Defendant contends that the trial court erred by refusing to allow Scott Frazier, a former member of the Walter Williams coaching staff, to testify that he possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. More specifically, Defendant contends that the excluded evidence should have been admitted since it related to a pertinent character trait that had a special relationship to the crimes with which he had been charged. We do not find Defendant’s argument persuasive.

1. Standard of Review

The essential issue raised by Defendant’s second challenge to the trial court’s judgments is whether the testimony in question tended to show that Defendant possessed a character trait that is relevant to the matters at issue in this case. In other words, the inquiry that we are required to conduct in this instance is relevance-based in nature. Although “a trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to [N.C. Gen. Stat. § 8C-1,] Rule 403, such rulings are given great deference on appeal.” *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228, *appeal dismissed*, 331 N.C. 290, 416 S.E.2d 398 (1991), *cert. denied*, 506 U.S. 915, 121 S.E.2d 321, 121 L. Ed. 2d 241 (1992). As a result, we will review Defendant’s challenge to the exclusion

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of Mr. Frazier's testimony using the loose *de novo* standard of review utilized in addressing relevance-related issues.

2. Admissibility of Proposed Character Evidence

According to N.C. Gen. Stat. § 8C-1, Rule 404(a)(1), "[e]vidence of a pertinent trait of [the accused's] character offered by an accused" is admissible. "The exception allowing evidence of a 'pertinent' trait should be 'restrictively construed,' [however,] since such evidence is excluded as a general rule." *State v. Wagoner*, 131 N.C. App. 285, 293, 506 S.E.2d 738, 743 (1998) (quoting *State v. Sexton*, 336 N.C. 321, 359-60, 444 S.E.2d 879, 901, *cert. denied*, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994)), *disc. review denied*, 350 N.C. 105, 533 S.E.2d 476 (1999). As a result, "an accused may only introduce character evidence of 'pertinent' traits of his character and not evidence of overall 'good character.'" *Id.* (quoting *State v. Mustafa*, 113 N.C. App. 240, 245-46, 437 S.E.2d 906, 909, *cert. denied*, 336 N.C. 613, 447 S.E.2d 409 (1994)).

This Court addressed the admissibility of similar evidence in *Wagoner*, in which we held that the trial court properly excluded evidence tending to show the defendant's "psychological make-up," including testimony that he was not a high-risk sexual offender, on the theory that such evidence, which amounted to proof of the defendant's normality, did not tend to show the existence or non-existence of a pertinent character trait. *Id.* at 292-93, 506 S.E.2d at 743. Similarly, the evidence at issue in this case, which consisted of testimony from Mr. Frazier to the effect that he saw no indication that Defendant had an unnatural lust for or sexual interest in young girls, constituted nothing more than an attestation to Defendant's normalcy. As a result, given that the excluded testimony did not tend to show the existence or non-existence of a pertinent trait of character, the trial court did not err by excluding Mr. Frazier's testimony concerning Defendant's lack of unnatural lust for or sexual interest in young girls.

C. Instruction Concerning Defendant's Character or Honesty and Trustworthiness

[3] Finally, Defendant contends that the trial court erred by refusing to instruct the jury that it could consider evidence concerning his character for honesty and trustworthiness as substantive evidence of his guilt or innocence. According to Defendant, the trial court was required to deliver the requested instruction given that it constituted an accurate statement of the law arising from the evidence. We do not find Defendant's argument persuasive.

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1. Standard of Review

As we have previously noted, arguments “challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *Osorio*, 196 N.C. App. at 466, 675 S.E.2d at 149. Thus, we will review Defendant’s challenge to the trial court’s refusal to instruct the jury that it was entitled to consider the evidence tending to show that Defendant was honest and trustworthy as substantive evidence of his guilt or innocence using a *de novo* standard of review.

2. Appropriateness of Honesty and Trustworthiness Instruction

At trial, five witnesses testified, in essence, that Defendant was honest and trustworthy. During the jury instruction conference, Defendant requested that the trial court instruct the jury in accordance with N.C.P.J.I. 105.60, which informs the jury that a person having a particular character trait “may be less likely to commit the alleged crime(s) than one who lacks the character trait” and tells the jury that, if it “believe[d] from the evidence [that the defendant] possessed the character trait” in question, it “may consider this in [its] determination of [Defendant’s] guilt or innocence[.]” The trial court rejected Defendant’s request.

As we have already noted, “when a request is made for a specific instruction that is supported by the evidence and is a correct statement of the law, the court, although not required to give the requested instruction verbatim, must charge the jury in substantial conformity therewith.” *State v. Holder*, 331 N.C. 462, 474, 418 S.E.2d 197, 203 (1992). For that reason, the trial court would have been required to deliver the requested instruction in the event that the jury could reasonably find that an honest and trustworthy person was less likely to commit the crimes at issue in this case than a person who lacked those character traits. As the Supreme Court noted in *State v. Bogle*, “a person is ‘truthful’ if she *speaks* the truth” and “is ‘honest’ if his *conduct*, including his speech, is free from fraud or deception.” 324 N.C. 190, 202, 376 S.E.2d 745, 752 (1989). Similarly, a person is “trustworthy” if he or she is “worthy of trust; dependable, reliable.” *Webster’s New World College Dictionary* 1537 (4th ed. 2006). Although an individual’s honesty and trustworthiness are certainly relevant to an individual’s credibility, we are unable to say that a person exhibiting those character traits is less likely than others to commit a sexual offense against a child of 13, 14, or 15 years of age or to take indecent liberties with a student while acting as a first responder. *Bogle*, 324 N.C. at 202, 376 S.E.2d at 752 (stating that, since “[n]either trafficking by possession nor by transporting marijuana necessarily involves being untruthful or engaging in fraud or deception,”

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“we hold that the traits of truthfulness and honesty are not ‘pertinent’ character traits to the crime of trafficking in marijuana by possession or transportation”). As a result, the trial court did not err by refusing to instruct the jury that it could consider the evidence tending to show that Defendant was an honest and trustworthy individual as substantive evidence of his guilt or innocence.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant’s challenges to the trial court’s judgments have merit. As a result, the trial court’s judgments should, and hereby do, remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Chief Judge MARTIN concurred in this opinion prior to 1 August 2014.

STATE OF NORTH CAROLINA
v.
BRANDON MIKAL FOSTER, DEFENDANT

No. COA13-1084

Filed 5 August 2014

1. Drugs—delivery of cocaine—jury instruction—entrapment

The trial court erred in a delivery of cocaine case by failing to instruct the jury on the defense of entrapment. Defendant presented sufficient evidence that an undercover officer tricked him into believing that the officer was romantically interested in defendant in order to persuade defendant to obtain cocaine for him, that defendant had no predisposition to commit a drug offense such as delivering cocaine, and that the criminal design originated solely with the officer.

2. Discovery—sanction—failure to instruct jury—defense of entrapment—lack of notice of defense

The trial court abused its discretion in a delivery of cocaine case by failing to instruct the jury on the defense of entrapment as

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a discovery sanction under N.C.G.S. § 15A-910(a) for failure to provide specific information as to the nature and extent of the defense. The trial court made no findings of fact to justify imposition of such a harsh sanction, and the State had not shown that it suffered any prejudice from the lack of detail in the notice filed eight months prior to trial.

Appeal by defendant from judgment entered 11 October 2012 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Alesia M. Balshakova, for the State.

Gilda C. Rodriguez for defendant-appellant.

GEER, Judge.

Defendant Brandon Mikal Foster appeals his conviction of delivery of cocaine. Defendant argues on appeal that the trial court erred in refusing to instruct the jury on the defense of entrapment. Based on defendant's evidence that an undercover officer tricked defendant into believing that the officer was romantically interested in defendant in order to persuade defendant to obtain cocaine for him, that defendant had no predisposition to commit a drug offense such as delivering cocaine, and that the criminal design originated solely with the officer, we hold that the trial court erred in failing to instruct the jury on the defense of entrapment.

The trial court, however, indicated that it was also denying the request for an instruction as a sanction under N.C. Gen. Stat. § 15A-910(a) for failure to provide "specific information as to the nature and extent of the defense" as required by N.C. Gen. Stat. § 15A-905(c)(1)(b) (2013). Because the trial court made no findings of fact to justify imposition of such a harsh sanction, and the State has not shown that it suffered any prejudice from the lack of detail in the notice filed eight months prior to trial, we hold that the trial court abused its discretion in precluding the use of the entrapment defense as a sanction. Consequently, defendant is entitled to a new trial.

Facts

The State's evidence tended to show the following facts. On 22 June 2011, Officer Thomas Wishon, Officer Daniel Bignall, and Detective Hefner

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of the Charlotte-Mecklenburg Police Department (“CMPD”) were working undercover at Chasers, a male strip club in Charlotte, North Carolina, investigating a complaint of sexually-oriented business and narcotics violations. Defendant was working as a dancer at the club that night, and there were only a few patrons at the club. Defendant, whose stage name was Thunder, and another dancer with the stage name Mercury approached the officers after they finished dancing. Mercury and defendant gave lap dances to Officer Bignall and Detective Hefner.

Officer Wishon engaged in small talk with defendant throughout the evening. Officer Wishon admitted that he tipped defendant and flirted, maintained eye contact, and joked with defendant. Towards the end of the night, Officer Wishon asked defendant if he had a “hookup” and indicated that he would like to buy some cocaine. Defendant stated that he had a “connect.” Officer Wishon asked defendant for his phone number and told defendant that he was going to a friend’s party but would be back after the party. Before leaving, Officer Wishon gave defendant a goodbye hug.

Later that night, Officer Wishon received three text messages from defendant. The first stated, “‘You have to come back. You never got a lap dance. LOL:)’” The second text stated, “‘I can get what you wanted if you need it. Let me know quick.’” The third text stated, “‘My friend needs to know what to get if your [sic] still wanting that.’” Officer Wishon did not respond to these text messages or return to the nightclub that night.

Officer Wishon did not text defendant until 29 June 2011, when he asked defendant if he was able to “hook him up.” Officer Wishon and defendant exchanged several text messages discussing the details of the deal. They arranged for Officer Wishon to go to Chasers the following day to make the purchase.

The next day, 30 June 2011, Officer Wishon went to Chasers where he and other undercover officers played pool with defendant until defendant’s “source” arrived. When defendant’s source, later identified as Paul Peterson, walked in, defendant said to Officer Wishon: “Oh. He’s here. Let me get your money.” Officer Wishon handed defendant \$185.00 and watched defendant follow Mr. Peterson into the bathroom. When defendant returned, he had a plastic baggy of cocaine tucked into his underwear on his hip. He asked Officer Wishon to be “frisky” with him. Officer Wishon told defendant that he was making him uncomfortable, but he, nevertheless, retrieved the plastic baggy of cocaine from defendant’s hip. Shortly thereafter, defendant was arrested.

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After defendant was read his rights, he agreed to talk with Officer Stephanie White of the CMPD. Defendant told Officer White that he met Mr. Peterson in the bathroom, took the \$185.00 given to him by Officer Wishon and exchanged it for the cocaine, put the cocaine in his underwear and Officer Wishon retrieved it. Defendant also told Officer White that Officer Wishon had offered him \$100.00 to broker the drug deal. Officer White testified that, generally, undercover officers will only offer someone a cigarette or up to \$5.00 at most to broker a drug deal and that defendant's claim that he was offered \$100.00 was a lie.

On 11 July 2011, defendant was indicted for sale of a controlled substance, possession with intent to sell or deliver a controlled substance, and delivery of a controlled substance. On 2 February 2012, defendant filed a notice of an intent to assert the defense of entrapment. The notice stated that "undercover CMPD Officer Wishon, acting on behalf of Charlotte Mecklenburg Police Department induced Brandon M. Foster to obtain cocaine, a crime not contemplated by Brandon M. Foster."

At a pretrial hearing on 8 October 2012, the State made a motion in limine to bar defendant from asserting the defense of entrapment on the grounds that the notice did not "contain specific information as to the nature and the extent of this defense" as required by N.C. Gen. Stat. § 15A-905(c). The trial court initially denied the State's motion and then asked defendant to describe more specifically what constituted entrapment in this case. After defendant gave a proffer of the evidence he intended to present to support the defense, the trial court again denied the State's motion. The trial began the following day.

Defendant testified in his own defense on the second day of trial. He testified that on the night of 22 June 2011, he believed that Officer Wishon was interested in him. Officer Wishon initiated a conversation with defendant by asking him if he was single and asking other personal information such as what he liked to do besides dancing. Defendant told Officer Wishon that he was in school and that he danced to pay the bills. He was intrigued by Officer Wishon, noting that Officer Wishon "never mentioned the fact that I was sitting there in boy shorts or that I am half naked" and instead kept the conversation intellectual and sincere.

By the end of the night, defendant had given Officer Wishon his real name and telephone number, information that he normally did not give guests at the club. At one point, defendant commented that he thought Officer Wishon liked Mercury. Officer Wishon responded that he was into defendant and that is why he wanted defendant's number and not Mercury's. When Officer Wishon left, he gave defendant a goodbye hug.

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At one point in the night, after having a one-on-one conversation with defendant, Officer Wishon asked both defendant and Mercury about getting “straight,” which is street language for cocaine. Defendant asked “[w]hat are you talking about?” Officer Wishon clarified that he was referring to cocaine. Defendant stated that he did not do drugs. However, both defendant and Mercury told Officer Wishon that they would ask around for him.

Defendant testified that he did ask around, but did not find anything that night. He did not speak to Officer Wishon about drugs again before the officers left. Although defendant texted Officer Wishon later about the lap dances, he denied sending the second and third text messages. The last communication between the two of them that night was Officer Wishon’s response stating that he was not coming back to the club that night.

Defendant did not hear from Officer Wishon again until one week later when he texted defendant, “Are you working tonight?” By that time, defendant had deleted Officer Wishon’s number from his phone, thinking that Officer Wishon had lost interest in him. Defendant’s first response, therefore, was to ask who was texting him. When defendant found out it was Officer Wishon, he became excited and giddy. They texted back and forth a few times, but when Officer Wishon turned the conversation back to narcotics, defendant slowed down his responses. Referring to cocaine, Officer Wishon asked defendant if he had ever found what Officer Wishon had asked for the night of 22 June 2011. Defendant told him he had not. Officer Wishon asked defendant if he could find him drugs, and defendant told him the same thing he had told him the first night – that he could ask around.

Defendant told Officer Wishon to contact Eric, a customer of defendant’s. Defendant began texting between both Officer Wishon and Eric, relaying the questions of Officer Wishon to Eric, and forwarding Eric’s responses to Officer Wishon. Officer Wishon told defendant he was planning on going to Chasers the following night. Defendant forwarded Officer Wishon a text from Eric stating that the drug dealer was supposed to be at Chasers that night as well.

On the night of 30 June 2011, defendant was excited to see Officer Wishon at Chasers and went over to talk to him after he had finished a set. It was a busy Friday night, so defendant was unable to talk as much as he had been able to talk on the first night. Instead, the conversations were centered on Officer Wishon’s questions about the dealer and whether he was there or not – Officer Wishon would go to the bar

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and tip defendant and ask defendant when the drug dealer would arrive. He tipped defendant \$10.00.

Eric was at the bar and signaled to defendant when the drug dealer, Paul Peterson, had arrived. Defendant recognized the drug dealer as “Uncle Paul,” a man who frequented the bar, but he did not know him personally. Defendant told Officer Wishon that the drug dealer was at the club, and Officer Wishon asked defendant to get the cocaine for him. Defendant took the money from Officer Wishon, followed Mr. Peterson to the bathroom, and returned with the cocaine. He put the drugs in his underwear and asked Officer Wishon to retrieve the drugs because he did not want to touch the drugs himself.

When asked why he got the drugs for Officer Wishon, defendant replied: “I was doing what I could to impress him. He seemed to like me. I liked him, so I tried to do that for him.” He also explained, “I had a crush. Having someone continuously ask you for the same thing makes you feel persuaded to do it.”

Defendant testified that in one of the texts from Officer Wishon, he was told he would be given \$100.00 for setting everything up. However, defendant did not state that money was what motivated him to help Officer Wishon. Instead, defendant explained:

I mean, I just I liked him. In my life and my organization at that profession I was doing, I didn’t get a lot of chances to meet decent people to actually date or who could possibly be a possible date.

When I found someone who I was really, really interested in and I felt like they were interested in me, I took a chance basically.

I didn’t per se want to do it with the narcotics or be involved in it. I felt like I was pushed more to get it or else the interest would have been lost on his part in me.

Defendant felt that Officer Wishon took advantage of both his emotions and his financial situation. He had told Officer Wishon that he lived with his mother and that he was working to support himself and his mother and pay for school. He had never gotten in trouble before and does not use or sell drugs.

At the close of all the evidence, the State again argued that it was not given notice of the nature and extent of defendant’s defense of entrapment until trial and asked that it be given until the following morning to

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address the issue of entrapment. In response, defense counsel asserted that defendant filed his intent to use the entrapment defense on 2 February 2012, 240 days prior to trial.

The trial court then indicated that “[w]hat the Court is going to hear with regard to the entrapment defense is whether or not that defense should go to the jury.” The court granted the State’s request that it wait to hear the parties’ arguments until the following morning. Specifically, the trial court stated, “In the morning at 9:30, [the court will hear the parties] about whether the issue of entrapment goes to the jury, based on the evidence before the Court.” Defense counsel responded: “So I may be clear what the State is asking and what the Court is deciding – we are not revisiting the issue of the motion in limine. We are objecting. There is sufficient evidence to present the testimony to submit to a jury or its consideration.”

The following morning, after hearing the parties’ arguments regarding the sufficiency of the evidence presented on entrapment, the trial court concluded that there was not sufficient evidence to instruct the jury on the entrapment defense. Although the parties had not addressed the adequacy of the notice, the trial court also added:

In addition, the Court having given further thought to the motion of State raises the issue of notice to the state [sic] of the intent to use the defense of entrapment, the Court finds that the defendant failed to comply with the statute; that the defendant did not give them specifics as to the basis of the defense.

So in addition to the Court’s rul[ing] finding that the defendant failed to present sufficient or competent evidence of entrapment, the defendant further failed to notify the State in accordance with the statute of its intent to raise the defense of entrapment. The Court will not submit the issue of entrapment to the jury.

The jury found defendant guilty of delivery of cocaine and not guilty of the other two offenses. The trial court sentenced defendant to a presumptive-range term of five to six months imprisonment. The court suspended defendant’s sentence and placed defendant on supervised probation for 12 months. Defendant timely appealed to this Court.

Discussion

[1] Defendant first argues that the trial court erred in concluding that the evidence was insufficient to warrant submission of the defense of entrapment to the jury.

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“Entrapment is the inducement of a person to commit a criminal offense not contemplated by that person, for the mere purpose of instituting a criminal action against him. To establish the defense of entrapment, it must be shown that (1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit a crime, and (2) the criminal design originated in the minds of those officials, rather than with the defendant. The defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials. The defendant has the burden of proving entrapment to the satisfaction of the jury.”

State v. Thompson, 141 N.C. App. 698, 706, 543 S.E.2d 160, 165 (2001) (quoting *State v. Davis*, 126 N.C. App. 415, 417-18, 485 S.E.2d 329, 331 (1997)).

“The fact that governmental officials merely afford opportunities or facilities for the commission of the offense is, standing alone, not enough to give rise to the defense of entrapment.” *State v. Hageman*, 307 N.C. 1, 30, 296 S.E.2d 433, 449 (1982). Instead, the defendant must present evidence that the law enforcement officers or their agents engaged in “acts of persuasion, trickery, or fraud[.]” *State v. Martin*, 77 N.C. App. 61, 67, 334 S.E.2d 459, 462 (1985). “A defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant’s evidence, viewed in the light most favorable to the defendant.” *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983).

In *State v. Stanley*, 288 N.C. 19, 32-33, 215 S.E.2d 589, 597-98 (1975), our Supreme Court held that the evidence presented at trial established that the defendant was entrapped as a matter of law. There, the undisputed evidence showed that an undercover officer, based on false representations, befriended the teenage defendant and became a “big brother” figure to him. *Id.* at 32, 215 S.E.2d at 597. The officer repeatedly asked the defendant where he could find and buy drugs, persuaded the defendant to make more than one drug buy for him, and supplied the money for the purchases. *Id.* at 21-22, 215 S.E.2d at 591. On two occasions prior to his arrest for possession of a controlled substance, the defendant purchased drugs that turned out to be counterfeit because the defendant did not know the difference. *Id.* at 22, 215 S.E.2d at 591. The Supreme Court held that this evidence demonstrated that the criminal design originated with the officer, and there was not any evidence

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indicating that the defendant was predisposed to engage in possession or distribution of drugs. *Id.* at 32-33, 215 S.E.2d at 597-98.

Even where the evidence does not establish entrapment as a matter of law, “[i]f defendant’s evidence creates an issue of fact as to entrapment, then the jury must be instructed on the defense of entrapment.” *State v. Branham*, 153 N.C. App. 91, 100, 569 S.E.2d 24, 29 (2002). In *Branham*, the defendant testified that two days before he was arrested, an informant, who was the older brother of a girl defendant knew, asked defendant if he “‘could get him a kilo of Cocaine,’” and the defendant responded that he had no idea where to get it. *Id.*, 569 S.E.2d at 30. The next day, the informant repeatedly asked the defendant for LSD, and persisted until the defendant agreed to locate the LSD requested. *Id.* Although the defendant offered to drive the informant to the seller so that the informant could make the purchase himself, the defendant ultimately agreed to make the purchase after the informant offered the defendant an additional \$100.00. *Id.* at 100-01, 569 S.E.2d at 30.

This Court held that the trial court properly instructed the jury on the issue of entrapment since “there was evidence that [an informant] and the officers initiated the offense, but also evidence from which the jury could have inferred that defendant was predisposed to sell LSD.” *Id.* at 100, 569 S.E.2d at 30. Specifically, “[d]efendant’s testimony that [the informant] repeatedly pushed defendant to obtain drugs for him, that he attempted to get [the informant] to make the purchase himself, and that he had never before been involved in any drug sales of this quantity” was sufficient to raise an issue of fact as to inducement and lack of predisposition to commit the offenses, despite the State’s evidence to the contrary. *Id.* at 101-02, 569 S.E.2d at 30.

In *Jamerson*, the defendant presented evidence that an undercover officer and an informant came to the defendant’s apartment and asked the defendant to sell them some drugs, but the defendant said that he did not have any. 64 N.C. App. at 302, 307 S.E.2d at 436. When the officer and informant returned a few hours later and the defendant still did not have any drugs and had not made any attempt to locate any drugs, the officer repeatedly told the defendant that he desperately needed drugs because he was an addict. *Id.*, 307 S.E.2d at 437. After the informant located a person who would sell drugs and offered the defendant \$15.00 to make the purchase, the informant drove the defendant to the location and the defendant made the purchase with money provided by the officer. *Id.* This Court held that this evidence was sufficient to require submission of a jury instruction on entrapment. *Id.* at 303, 307 S.E.2d at 437.

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We believe that the facts of this case are analogous to *Stanley*, *Branham*, and *Jamerson*. Defendant's evidence and Officer Wishon's own testimony tended to show that Officer Wishon falsely led defendant to believe that he was romantically interested in defendant by asking him personal questions about defendant's life, maintaining eye contact, flirting, joking with him throughout the evening, asking for defendant's phone number, saying that he was "into" defendant rather than another dancer, and giving defendant a hug goodbye the first night they met.

The undisputed evidence shows that Officer Wishon, who was investigating narcotics violations, initiated the conversation regarding drugs by asking defendant where he could get "straight," a street term for cocaine that defendant did not understand. After Officer Wishon clarified that he was referring to cocaine, defendant told Officer Wishon that he did not do drugs but that he would ask around. Although the State presented evidence that defendant, later that evening, renewed the conversation about his obtaining cocaine for Officer Wishon in two text messages defendant sent, defendant admitted sending only a flirtatious text message that did not mention drugs and denied sending the other two text messages. For purposes of the entrapment issue, we must assume that defendant's testimony is true.

Consequently, viewing the evidence in the light most favorable to defendant, there was no further discussion of drugs after defendant said simply that he would ask around until, a week later, Officer Wishon texted defendant about whether he was working that night. In the meantime, defendant had deleted Officer Wishon's phone number from his phone, an act a jury could find was consistent with someone focused on a romantic interest rather than a potential drug client. The initial texts a week later were not about drugs, but Officer Wishon then again asked defendant about obtaining drugs for him. Defendant ultimately did not himself act as an intermediary with the drug dealer, but identified one of his clients who could assist Officer Wishon with connecting with the drug dealer – evidence which suggests that defendant did not have a predisposition to engage in drug dealing.

In addition, defendant testified that he only agreed to help Officer Wishon obtain the drugs because he was romantically interested in Officer Wishon, and, after being continuously asked about the drugs, "felt like [he] was pushed more to get it or else the interest would have been lost on [Officer Wishon's] part in [defendant]." The record also contains no evidence that defendant had previously used drugs, engaged in drug dealing, or was aware of common street lingo for drugs – indeed, the record

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contains no evidence of any other behavior on defendant's part that was suggestive of a predisposition to help supply someone with drugs.

In sum, viewed in a light most favorable to defendant, Officer Wishon's flirtatious behavior towards defendant combined with his persistent requests for cocaine persuaded defendant to obtain the cocaine for Officer Wishon. Further, defendant's evidence would permit the jury to find that the idea for the crime (delivery of cocaine) originated with and was pursued solely by Officer Wishon, with no indication that defendant had any predisposition to participate in drug transactions.

Thus, as in *Stanley*, *Branham*, and *Jamerson*, the undercover officer initiated the conversation about drugs, persisted in seeking drugs, and provided defendant with the money for the exchange. Moreover, Officer Wishon's acts of inducement, like those of the undercover officer in *Stanley*, involved emotional manipulation including creating a false relationship and then taking advantage of the defendant's desire to maintain that relationship. Finally, as in *Stanley*, there was no evidence of predisposition.

The State, nevertheless, argues that Officer Wishon merely afforded defendant the opportunity to commit the offense, arguing that the facts of this case are analogous to *Thompson*, *Martin*, *State v. Rowe*, 33 N.C. App. 611, 235 S.E.2d 873 (1977), *State v. Booker*, 33 N.C. App. 223, 234 S.E.2d 417 (1977), and *State v. Stanback*, 19 N.C. App. 375, 198 S.E.2d 759 (1973), decisions holding that the evidence was insufficient to show that the defendant was entrapped. We disagree.

In each of the cases cited by the State, the evidence established that the undercover agent had reason to believe the defendant was a drug dealer, or the defendant was otherwise specifically targeted by the undercover agent because the agent had reason to believe the defendant could obtain drugs. *See Martin*, 77 N.C. App. at 63, 334 S.E.2d at 460 (evidence was presented that defendant told undercover agent that "he had been dealing drugs for sixteen years and had a reputation in the community as a 'fair dealer who gave a good product at a fair price'"); *Thompson*, 141 N.C. App. at 699-700, 543 S.E.2d at 162 (sheriff's office received information from informant that defendant was selling drugs from his apartment and defendant was a heroin addict with extensive criminal history); *Booker*, 33 N.C. App. at 223, 234 S.E.2d at 417 (undercover officer went to defendant's house and asked to buy drugs, and defendant stated that he knew where he could get some marijuana and was able to retrieve drugs in 20 minutes); *Rowe*, 33 N.C. App. at 614, 235 S.E.2d at 875 (evidence established that undercover agent "worked

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herself into the drug traffic society and purchased drugs from the defendant”); *Stanback*, 19 N.C. App. at 376, 198 S.E.2d at 760 (undercover agent went to defendant’s apartment to purchase drugs that defendant had promised to sell to agent previous day, and defendant told agent after transaction that “[a]nytime you need anything, an ounce or a lid or a pound, I can get it for you”).

While the State argues that this case is similar to the decisions upon which it relies because defendant did not hesitate before telling Officer Wishon that he would ask around about drugs and did so in a short period of time, in the cases the State cites, any evidence tending to show that the defendant needed little urging before agreeing to the undercover agent’s request was consistent with the totality of the evidence suggesting that the defendant was, in fact, a drug dealer. When, in this case, the evidence is viewed in the light most favorable to defendant, there is no suggestion that defendant was a drug dealer, had any criminal history, or was in any way predisposed to commit the offense of delivery of cocaine independent of government influence.

Given the lack of evidence regarding defendant’s criminal predisposition, any evidence that defendant required little urging before agreeing to ask around for drugs could be attributed by a jury to defendant’s romantic interest in Officer Wishon and a desire to impress him. Thus, the evidence that the State points to as showing that defendant was predisposed to commit the crime is consistent with defendant’s theory of the entrapment defense and merely creates an issue of fact for the jury to decide. We therefore hold that defendant presented sufficient evidence of the essential elements of entrapment, and the trial court erred in refusing to instruct the jury based on a lack of evidence.

[2] The question remains whether the trial court’s denial of defendant’s request for an entrapment instruction may be upheld as a sanction for defendant’s failure to provide adequate notice of his defense. N.C. Gen. Stat. § 15A-905(c)(1)(b) specifies that a defendant must provide the State with notice of its intent to offer at trial the defense of entrapment and that the notice must “contain specific information as to the nature and extent of the defense.” The trial court, in this case, found generally that defendant violated N.C. Gen. Stat. § 15A-905(c)(1)(b) because “defendant did not give [the State] specifics as to the basis of the defense.” The trial court then used this violation as an additional basis for its refusal to submit the issue of entrapment to the jury.

If a trial court determines that a defendant has violated N.C. Gen. Stat. § 15A-905(c)(1)(b), it may impose any of the following sanctions on the defendant:

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- (1) Order the party to permit the discovery or inspection, or
- (2) Grant a continuance or recess, or
- (3) Prohibit the party from introducing evidence not disclosed, or
- (3a) Declare a mistrial, or
- (3b) Dismiss the charge, with or without prejudice, or
- (4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2013).

However, “[p]rior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article.” N.C. Gen. Stat. § 15A-910(b). “If the court imposes any sanction, it must make specific findings justifying the imposed sanction.” N.C. Gen. Stat. § 15A-910(d).

“Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court.” *State v. Tucker*, 329 N.C. 709, 716, 407 S.E.2d 805, 810 (1991). “‘Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.’” *State v. Elliot*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

As explained by our Supreme Court, “the rules of discovery contained in the Criminal Procedure Act were enacted by the General Assembly to ensure, insofar as possible, that defendants receive a fair trial and not be taken by surprise. They were not enacted to serve as mandatory rules of exclusion for trivial defects in the State’s mode of compliance.” *State v. Thomas*, 291 N.C. 687, 692, 231 S.E.2d 585, 588 (1977). Despite the General Assembly’s emphasis on protecting defendants from the State’s noncompliance, “[s]uch legislative intent . . . does not give defendants *carte blanche* to violate discovery orders, but rather, defendants and defense counsel both must act in good faith, just as is required of their counterparts representing the State.” *State v. Gillespie*, 180 N.C. App. 514, 525, 638 S.E.2d 481, 489 (2006), *modified and affirmed*, 362 N.C. 150, 655 S.E.2d 355 (2008). Thus, the rules of discovery have been applied with equal force to both defendants and the State to ensure a fair trial and avoid unfair surprise for both parties.

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See, e.g., *State v. McMahon*, 67 N.C. App. 181, 183, 312 S.E.2d 526, 527 (1984) (applying common law notions of fairness and holding that discovery rule applicable to State is equally applicable to defendant).

In *State v. Cooper*, ___ N.C. App. ___, ___, 747 S.E.2d 398, 414 (2013), *appeal dismissed and disc. review denied*, ___ N.C. ___, 753 S.E.2d 783 (2014), this Court reversed the trial court's imposition of sanctions against a defendant when the sanction imposed "was disproportionate to the purposes this state's discovery rules were intended to serve." In *Cooper*, the trial court had excluded the testimony of the defendant's second expert witness as a sanction for the defendant's failure to disclose the witness to the State as required by N.C. Gen. Stat. § 15A-905 (2011). ___ N.C. App. at ___, 747 S.E.2d at 403. The defendant had only proffered the second expert witness after the State successfully moved at trial to exclude the testimony of defendant's first expert witness on the basis that the witness was not qualified to testify as an expert. *Id.* at ___, 747 S.E.2d at 413. Because the State had not indicated any intention to challenge the defendant's first expert witness prior to trial, the defendant did not anticipate needing a second expert, and, as a result, did not have the second expert on its witness list. *Id.* at ___, 747 S.E.2d at 413.

In addressing whether the trial court abused its discretion in sanctioning the defendant by excluding the testimony of the expert witness, the *Cooper* Court first recognized that the imposition of sanctions on a criminal defendant has constitutional implications because of a defendant's constitutional right under the Sixth Amendment to present a defense. *Id.* at ___, 747 S.E.2d at 414. The Court then pointed to the factors set out by the United States Supreme Court in *Taylor v. Illinois*, 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988), to be considered in determining the appropriate sanction, consistent with that constitutional right, when a defendant has failed to disclose a witness:

"Although the *Taylor* Court declined to cast a mechanical standard to govern all possible cases, it established that, as a general matter, the trial judge (in deciding which sanction to impose) must weigh the defendant's right to compulsory process against the countervailing public interests: (1) the integrity of the adversary process, (2) the interest in the fair and efficient administration of justice, and (3) the potential prejudice to the truth-determining function of the trial process. The judge should also factor into the mix the nature of the explanation given for the party's failure seasonably to abide by the discovery request, the willfulness *vel non* of the violation, the relative simplicity

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of compliance, and whether or not some unfair tactical advantage has been sought.”

___ N.C. App. at ___, 747 S.E.2d at 415 (quoting *Chappee v. Vose*, 843 F.2d 25, 29 (1st Cir. 1988)).

Applying the *Taylor* factors to the facts in *Cooper*, the Court reasoned:

Defendant, in failing to provide earlier notice to the State, was clearly not seeking any tactical advantage. The trial court made no finding of willful misconduct, and the record divulges none. Defendant only sought out another expert . . . after the State was successful in moving to limit [the first expert’s] testimony in the middle of the trial. At that point, Defendant had no way to present vital expert testimony and comply with N.C.G.S. § 15A-905(c)(2).

In light of the lack of willful misconduct on the part of Defendant, the rational reason presented for failing to inform the State before trial that Defendant would be calling [the second expert], the role of the State in having this situation arise after the trial had commenced, the fundamental nature of the rights involved, the importance to the defense of the testimony excluded, and the minimal prejudice to the State had the trial court imposed a lesser sanction – such as continuance or recess, we hold that imposing the harsh sanction of excluding [the second expert] from testifying constituted an abuse of discretion.

Id. at ___, 747 S.E.2d at 415.

In *State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452, *appeal dismissed and disc. review denied*, 366 N.C. 594, 743 S.E.2d 205 (2013), this Court addressed, in similar fashion, the appropriateness of the extreme sanction of dismissal when the State has committed a discovery violation, even though sanctioning the State has no constitutional implications. The Court held that “[g]iven that dismissal of charges is an “extreme sanction” which should not be routinely imposed,” such dismissals “should also contain findings which detail the perceived prejudice to the defendant which justifies the extreme sanction imposed.” *Id.* at ___, 737 S.E.2d at 470 (quoting *State v. Allen*, ___ N.C. App. ___, ___, 731 S.E.2d 510, 527-28, *disc. review denied*, 366 N.C. 415, 737 S.E.2d 377 (2012), *cert. denied*, ___ U.S. ___, 185 L. Ed. 2d 876, 133 S. Ct. 2009 (2013)). After noting that the defendant had possession of the evidence

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the State initially failed to disclose, the Court held that “[a]bsent a finding explaining the specific and continuing prejudice Defendant will suffer, the trial court’s order dismissing the charge on this basis is in error.” *Id.* at ___, 737 S.E.2d at 470.

We see no reason why the rules set out in *Cooper* and *Dorman* should not apply with equal force to a trial court’s refusal to instruct the jury on an affirmative defense presented by the defendant. Such a sanction in this case has the same effect on the defendant as the “harsh sanction” in *Cooper* that interfered with the defendant’s defense – even though defendant was allowed to present entrapment evidence, the jury was not instructed in a way that permitted it to consider that evidence as a basis for acquitting defendant. Given such a harsh sanction, the trial court was required, under *Dorman*, to justify the sanction with findings regarding the prejudice to the State resulting from defendant’s discovery violation.

Requiring the trial court to consider the prejudice to the State resulting from the defendant’s discovery violation before imposing the extreme sanction of precluding an affirmative defense is also consistent with this court’s holding in *State v. McDonald*, 191 N.C. App. 782, 786-87, 663 S.E.2d 462, 465 (2008). In *McDonald*, the defendant failed to provide the State with notice of the defenses it intended to assert at trial as required by N.C. Gen. Stat. § 15A-905, despite the State having made several motions requesting notice of defenses. *Id.* at 785, 663 S.E.2d at 464-65. The trial court ultimately allowed the defendant to assert the defenses of duress and accident but precluded the defendant from asserting the defenses of voluntary intoxication and diminished capacity. *Id.*, 663 S.E.2d at 465.

This Court noted that the State “had anticipated the accident defense” and that “unlike the diminished capacity and voluntary intoxication defenses, the defense of duress would not require substantial preparation on the part of the State, including the engagement of experts.” *Id.* at 786, 663 S.E.2d at 465. Because the trial court “precluded only those defenses that would have prejudiced the State” and allowed defendant to proceed with other defenses – either because the State could have anticipated the defense, or because the State could quickly and adequately prepare despite the late notice – this Court held that the trial court’s sanction was not an abuse of discretion. *Id.* at 787, 663 S.E.2d at 465.

In line with this Court’s analysis in *Cooper*, *Dorman*, and *McDonald*, we hold that in considering the totality of the circumstances prior to

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imposing sanctions on a defendant, relevant factors for the trial court to consider include without limitation: (1) the defendant's explanation for the discovery violation including whether the discovery violation constituted willful misconduct on the part of the defendant or whether the defendant sought to gain a tactical advantage by committing the discovery violation, (2) the State's role, if any, in bringing about the violation, (3) the prejudice to the State resulting from the defendant's discovery violation, (4) the prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any fundamental rights of the defendant, and (5) the possibility of imposing a less severe sanction on the defendant.

In this case, the trial court found that defendant violated N.C. Gen. Stat. § 15A-905(c)(1)(b) because "defendant did not give [the State] specifics as to the basis of the defense." Assuming, without deciding, that defendant's notice constituted a discovery violation, we must determine, in light of the factors listed above, whether the trial court abused its discretion in refusing to instruct the jury on the defense of entrapment.

We note first that the procedure by which the trial court concluded that defendant failed to comply with the notice requirements suggests that it was not the result of a reasoned decision. The trial court originally denied the State's pretrial motion for sanctions. At the end of the trial, the trial court indicated that it would hear oral argument regarding the submission of the entrapment defense to the jury, but specifically limited the party's arguments to the sufficiency of the evidence – the court confirmed that it would not be revisiting the court's decision to deny the State's pretrial motion for sanctions. Nevertheless, after ruling that the evidence presented by defendant was insufficient to support an instruction on the defense of entrapment, the trial court, *sua sponte*, without giving defendant any notice or an opportunity to be heard, decided to reverse its denial of the State's pretrial motion for sanctions and preclude the use of the entrapment defense as a sanction.

In doing so, the trial court made no findings "justifying the imposed sanction" as required by N.C. Gen. Stat. § 15A-910(d) and made no finding that the State had been prejudiced by the lack of specifics in defendant's notice. The court simply found that defendant had failed to fully comply with the notice statute. The procedure followed by the trial court, the failure to find prejudice, and the lack of findings are inconsistent with the court's ruling being a reasoned decision to further the purposes of the rules of discovery. Rather, the record suggests that the trial court imposed sanctions simply as an afterthought to bolster its decision not to instruct the jury on entrapment.

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In addition, our review of the record reveals no basis for imposing the extreme sanction of precluding a defense. There is no indication that defendant, in failing to give more specifics in his notice, acted in bad faith or to gain an unfair advantage at trial. Rather, defendant filed a timely notice well in advance of trial, disclosing his intent to assert the defense of entrapment and including the identity of the specific officer whom defendant contended induced him to commit the crime. The State made no showing that the omission of further details was in bad faith or a tactical move.

Indeed, the record indicates that any lack of preparation to meet the defense was contributed to by the State's failing to take timely action. Defendant filed his notice on 2 February 2012 – more than eight months prior to trial. During that time, the State had general notice of defendant's intent to use the defense and specific notice that Officer Wishon's actions resulted in the alleged entrapment. Officer Wishon, the State's lead witness, was readily accessible to the State for questioning regarding his conduct in interacting with defendant. In the event that the State desired additional specifics regarding defendant's entrapment defense, the State could have requested more information from defendant or moved for an order requiring defendant to provide adequate discovery. Given defense counsel's apparent belief that he had complied with N.C. Gen. Stat. § 15A-905(c)(1)(b), the State's failure to request more information or to alert defendant that its notice was inadequate during the eight months prior to trial, similar to the State's failure in *Cooper* to notify the defendant prior to trial of its intention to challenge the defendant's primary expert, deprived defendant of an opportunity to comply with the rules of discovery in a timely fashion and avoid being subject to sanctions.

Moreover, the refusal to instruct the jury concerning an affirmative defense is a harsh sanction that implicates defendant's fundamental right to present a defense at trial. In contrast, the prejudice to the State resulting from defendant's violation was minimal. During the pretrial motions hearing, defendant gave a detailed proffer of the evidence he intended to present to establish entrapment. The State did not call its first witness until the following day, and defendant did not testify until the second day of trial. Because the evidence on entrapment was testimonial in nature, was limited to the acts of Officer Wishon, and "would not require substantial preparation on the part of the State, including the engagement of experts[.]" *McDonald*, 191 at 786, 663 S.E.2d at 465, the additional days to prepare after receiving notice of the nature and extent of defendant's entrapment defense should have been sufficient

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to remedy any prejudice to the State. In any event, the State would not have been prejudiced had the trial court imposed a less severe sanction such as a continuance or a recess.

After considering the totality of the circumstances, we hold that the trial court's refusal to instruct the jury on the entrapment defense was not a proper sanction for any failure by defendant to provide sufficiently specific notice of his intent to assert the defense of entrapment. The trial court's ruling, therefore, constituted an abuse of discretion. *See Dorman*, ___ N.C. App. at ___, 737 S.E.2d at 470 (holding trial court's pretrial order suppressing certain witnesses' testimony from use in future proceedings based on State's initial failure to disclose various documented conversations was in error when defendant was in possession of the relevant information well before trial, and trial court failed to detail specific and continuing prejudice defendant suffered as a result of initial nondisclosure and failed to explain how suppression of witnesses' testimony remedied non-disclosure).

Conclusion

We hold that defendant presented sufficient evidence to warrant submission of the entrapment defense to the jury. Further, the trial court abused its discretion when precluding the entrapment defense as a sanction for defendant's having served a notice of his intent to rely upon the entrapment defense that was not sufficiently specific. Defendant is, therefore, entitled to a new trial.

New trial.

Judges STEPHENS and ERVIN concur.

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STATE OF NORTH CAROLINA

v.

KEITH LAUCHON JACKSON, JR., DEFENDANT

No. COA14-140

Filed 5 August 2014

1. Criminal Law—defendant’s escape attempt during trial—additional security—jury instructions

Given the facts of the case, the trial court did not abuse its discretion or violate defendant’s constitutional rights by ordering physical restraints on defendant, additional security in the courtroom, and an escort for the jury at the end of the day after defendant attempted to escape during his trial for murder and armed robbery. The jury was sequestered in the jury room at the time and was told only that there had been a security incident. The trial court specifically instructed the jury not to consider the use of restraints and the jury had no way to know that the security issue of the previous day was related to defendant’s trial until evidence of defendant’s escape was introduced.

2. Criminal Law—defendant’s escape attempt—increased security—individual inquiry not made

The trial court did not err or violate defendant’s due process rights by failing to individually ask the jurors whether they had been affected by increased security after defendant attempted to escape during trial. Under these facts, a general inquiry of the jury regarding their exposure to media coverage of the trial was sufficient to ensure that they had not been exposed to improper, prejudicial material.

3. Evidence—attempted escape during trial—admissible

The trial court did not abuse its discretion in a prosecution for murder and armed robbery by admitting evidence of defendant’s attempted escape during his trial. Although defendant persuasively argued that evidence of his escape was highly prejudicial, the evidence was not unfairly prejudicial. The inference that defendant attempted to escape because he is guilty is precisely the inference that makes evidence of flight relevant.

4. Evidence—prison letter—written in Crip code—admissible

The trial court did not err in a prosecution for robbery and murder by admitting a letter defendant wrote while in jail that was in Crip code and by allowing the State to ask him on cross-examination

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whether he was in a gang. The letter itself was relevant and not unfairly prejudicial because defendant solicited in the letter the murder of one of the State's primary witnesses against him. Moreover, evidence relating to defendant's gang membership was necessary to understand the context and relevance of the letter.

Appeal by defendant from Judgment entered 17 June 2013 by Judge John O. Craig, III, in Superior Court, Guilford County. Heard in the Court of Appeals 4 June 2014.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Richard L. Harrison, for the State.

Kathryn L. VandenBerg, for defendant-appellant.

STROUD, Judge.

Keith Jackson ("defendant") appeals from the judgment entered after a Guilford County jury found him guilty of first degree murder. We find no error.

I. Background

Defendant was indicted for murder and robbery with a dangerous weapon on 14 April 2008. The indictments alleged that defendant robbed a Lucky Mart store in High Point on 31 October 2007 and, in doing so, shot and killed Joshua Sweitzer. Defendant pled not guilty and proceeded to jury trial.

During the lunch break on the first day of testimony, defendant escaped from custody of the sheriffs. As he was being led out of the holding cell, defendant managed to slip out of his leg shackles. Once he was free from his leg shackles, he ran from the bailiffs, fled down a corridor, vaulted about 15 feet over the railing onto the third floor, ran down the stairwell, and exited the courthouse. He was apprehended in a nearby parking lot.

Once he was returned to custody, the trial court addressed counsel. The jury was in the jury room when defendant escaped and none of them could have seen the incident, nor would they have been aware that the courthouse was briefly on "lockdown" due to the incident. So, the trial court decided to tell the jury only that there had been a security incident that would prohibit them from continuing for the day. The judge also decided to give the jurors a security escort to their cars. When he

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dismissed the jury for the day, he re-emphasized that they were not to read any media coverage of the trial. He further told them that the security escort was “nothing to be concerned about” and that it was just an effort “to exercise as much caution as need be.”

When court reconvened the next morning, defendant moved for a mistrial. He was concerned that the jurors “may have been tainted by the deluge of press coverage and the fact that the facility itself was under lockdown.” He further argued that having the jurors escorted to their cars could have been construed as an expression of judicial opinion. He asked the trial court to individually inquire of each juror.

The trial court explained that it had asked the bailiff to ask the jurors whether any of them had seen any reports about the events of the previous day. None of them indicated that they had. The trial court decided that it was unnecessary to individually inquire of the jurors. Instead, once the jury was back in the courtroom, the trial court asked them, as a whole, whether they had followed the court’s instructions to avoid any coverage of the trial. None of them indicated that they had violated the court’s instructions.

The trial court explained its decision to inquire of the jury as a whole:

They were probably never fully aware that the courthouse was in lockdown mode because they were sequestered in the jury room, and no one told them anything about what was going on. But as I had said yesterday, I did it out of an overabundance of caution. And I think in matters such as this, safety concerns always outweigh and are paramount to anything else, and I do not believe that the jury would necessarily connect it to anything involving this defendant, and I do not believe it necessary to conduct individual questioning of the jurors about this.

Before the trial recommenced, the trial court decided to order physical restraints and additional security personnel, including one bailiff standing within arm’s reach of defendant. Defendant objected to the added restraints. The trial court conducted the required hearing under N.C. Gen. Stat. § 15A-1031. The trial court found that

in light of the seriousness of the charge, first-degree murder, with the penalty being life imprisonment without the possibility of parole; the fact that the defendant is of a temperament that he sometimes loses his temper, and I

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have personally seen this in previous hearings as well as his prior attorneys have noted this and reported it to the Court; the defendant's relatively young age and his obvious nimbleness in being able to escape yesterday; the fact that he has made threats to harm others or cause a disturbance in the past, both to his prior attorneys and making statements to others; as well as the nature and physical security of the courtroom; and again, the need to protect those immediately around the defendant from any potential harm, the Court will find that it is necessary to restrain the defendant during the trial.

It concluded that

the restraint [was] reasonably necessary to maintain order, to prevent another escape attempt, and to provide for the safety of other persons in the defendant's immediate vicinity here in the courtroom. So I believe that in light of the events of yesterday, it is necessary for me to take this action.

After asking the jurors whether they had seen any coverage of the trial, the trial court instructed the jury on the additional restraints. It stated,

I am instructing you that the defendant has been placed in some physical restraints, and I do not – I am ordering you not to consider this in any fashion, whether in terms of weighing the evidence or in determining the defendant's guilt or innocence in this matter. You are to conduct yourselves just in a manner as if the defendant had not been placed in any restraints.

Defendant did not object to these instructions or request additional cautionary instructions. The remainder of the trial proceeded without incident.

At trial, the State's evidence showed the following:

On the evening of 31 October 2007, Josh Sweitzer was working the cash register in a Lucky Mart convenience store owned by his uncle, Travis Luck. Mr. Luck left the store to get Mr. Sweitzer some dinner. As he was leaving, he saw two men standing outside of the store. He asked them what they were doing. They claimed to be waiting for a ride. One of the men was defendant.

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After Mr. Luck left, two men walked into the store wearing bandanas over their faces and hoods covering their heads. One of the men walked up to the cash register and demanded money from Mr. Sweitzer. Mr. Sweitzer did not respond, so the man shot him in the head. He then approached the only customer in the store and demanded money from his wallet. The customer opened his wallet to show the gunman that he only had \$7. The two perpetrators then walked out of the store without taking any money. Mr. Sweitzer died of a single gunshot wound to the right side of his forehead. When Mr. Luck returned to his store, police had already responded to the scene and were in the process of putting up crime scene tape.

The next morning, Officer Kyle Shearer searched the area around the Lucky Mart. He found a blue baseball hat hidden in a bush, a camouflage bandana on the ground, and a .38 caliber silver revolver within approximately 200 yards of the store. The revolver still had five unspent rounds in it and one spent shell casing. No fingerprints were found on the revolver and no DNA was found on the bandana. Police were, however, able to recover DNA from the baseball hat. They later matched its predominate profile to defendant.

Ronnie Covington testified that on 31 October 2007, he and defendant were hanging out, discussing ways to get money, including robbery. Defendant had a .38 caliber revolver with him. Mr. Covington and defendant went to the Lucky Mart store. Mr. Covington went in first to buy a cigar and to see who was in the store and then stepped back out. They both then went into the store, where Mr. Covington confronted the only customer and defendant attempted to rob Mr. Sweitzer. While he was looking at the customer, Mr. Covington heard a single gunshot. He and defendant ran out of the store. Defendant hid his gun under an old car before leaving the area. Over the next several months, defendant, Mr. Covington, and other associates of theirs committed a string of armed robberies in the area.

Matthew Savoy, another one of the men involved in the string of armed robberies, also testified at trial. He testified that defendant said to him: "Man, you missed it. We hit this robbery and we murdered this dude. Man, we went into the store, pointed a gun at him and told him to give me the money. He wouldn't move. He ain't say nothing. So I like, man, give me the money. He was just looking at me, so I shot him in the face."

Mr. Savoy also testified that after he and defendant were arrested, they were placed in adjoining pods at the jail. They passed notes back

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and forth. Defendant passed one note to Mr. Savoy written in “Crip code,” a disguised method of writing used by members of the Crip gang and their associates. Mr. Savoy explained that defendant is a Crip, but denied being one himself. Nevertheless, he testified that he could read and understand “Crip code.” He translated the note written by defendant as follows:

Matt, what’s cracking, Big Homey. I hope everything 360 with you. Man, look, I just got a visit from my people, and shit, and where it is, Ronnie talking and his cousin Neco snitching on his behalf. That’s how Marcel got caught. We was at Neco’s house counting loot when we had hit the lick in Lexington. My grandma said they came and searched my crib off a statement somebody wrote. So where do your loyalty lie, Big Homey? You really want a position of power? You want – you want your mark of purity, Homey? Crip the fool a straight 187, and I’m thinking about admitting my part in all 12 licks so I can pull my 15 to 20 years and build our army, the East 99 Mafia Crips, and get the black book of knowledge. You dig, Big Homey? But shit, I got some canteen coming, so if you want – if you need something, I’m in M-19. Be safe, Homey.

The note was signed, “Young Blue,” which is defendant’s nickname. Mr. Savoy explained that “Crip the fool a straight 187” means to kill someone and that, in context, he understood that defendant was asking him to kill Ronnie Covington.¹

After defendant was arrested, he gave a number of statements to police. He admitting taking part in a string of armed robberies but denied involvement in the Lucky Mart murder. He named a couple people he thought might have been involved with the murder. Defendant later admitted that he made up the story implicating others in the Lucky Mart shooting, but continued to deny that he was involved.

After the State rested, defendant elected to present evidence and testify on his own behalf. Defendant denied participating in the Lucky Mart robbery and denied that he had ever been to the Lucky Mart. He admitted that the blue baseball hat was his, though he acknowledged

1. Colloquial use of the term “187” to refer to murder seems to be based upon § 187 of the California Penal Code, which defines the crime of murder. *See People v. Jones*, 70 P.3d 359, 376-77 (Cal. 2003) (discussing a Crips affiliate called “the 211 187 Hard Way Gangster Crips”); Cal. Penal Code § 187 (2014) (defining the crime of murder).

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that he had previously told the police otherwise. Defendant said that he “was lying like hell” when he denied that the hat was his. On cross-examination, the State asked him, over objection, about his escape in detail. The prosecutor also asked him, over objection, if he had been a Crip in 2008. Defendant admitted that he had been, though he denied being able to read or write “Crip code.”

The jury found defendant guilty of both attempted armed robbery and first degree murder. The trial court arrested judgment on the robbery conviction. On 17 June 2013, the trial court entered judgment on the murder conviction and sentenced defendant to life imprisonment without parole. Defendant gave notice of appeal in open court.

II. Improper Judicial Comment

[1] Defendant first argues that the trial court made an improper judicial comment on his dangerousness in violation of his due process rights and the prohibition of such comment in N.C. Gen. Stat. §§ 15A-1222 and 15A-1232. Defendant reasons that the trial court’s decision to order additional security, including physical restraints and an escort for the jury, was akin to a statement by the trial judge that defendant was “highly dangerous, and therefore probably guilty[.]” We conclude that the trial court did not abuse its discretion or violate defendant’s constitutional rights by ordering additional security measures after he attempted to escape.

While, as a general rule, a criminal defendant is entitled to be free from physical restraint at his trial, unless there are extraordinary circumstances which require otherwise, there is no per se prohibition against the use of restraint when it is necessary to maintain order or prevent escape. What is forbidden—by the due process and fair trial guarantees of the Fourteenth Amendment to the United States Constitution and Art. I, Sec. 19 of the North Carolina Constitution—is physical restraint that improperly deprives a defendant of a fair trial. Such a decision must necessarily be vested in the sound discretion of the trial court.

State v. Simpson, 153 N.C. App. 807, 809, 571 S.E.2d 274, 276 (2002) (citations and quotation marks omitted); see *Deck v. Missouri*, 544 U.S. 622, 632, 161 L.Ed. 2d 953, 964 (2005) (noting that “due process does not permit the use of visible restraints *if the trial court has not taken account of the circumstances of the particular case.*” (emphasis added)). Additionally, “it is within the judge’s discretion, when

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necessary, to order armed guards stationed in and about the courtroom and courthouse to preserve order and for the protection of the defendant and other participants in the trial.” *State v. Tolley*, 290 N.C. 349, 363, 226 S.E.2d 353, 365 (1976).

“We review the trial court’s decision of whether to place defendant in physical restraints [and to order additional security measures] for abuse of discretion.” *State v. Posey*, ___ N.C. App. ___, ___, 757 S.E.2d 369, 372 (2014) (citations, quotation marks, and brackets omitted). Nevertheless, “[t]he trial court’s discretion is not unbridled and must be exercised in a manner that is ‘not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by reason and conscience of the judge to a just result.’” *State v. Atkins*, 349 N.C. 62, 92, 505 S.E.2d 97, 116 (1998) (quoting *Langnes v. Green*, 282 U.S. 531, 541, 75 L.Ed. 520, 526 (1931)), *cert. denied*, 526 U.S. 1147, 143 L.Ed. 2d 1036 (1999).

In deciding whether restraints [and other security measures] are appropriate, a trial court may consider, among other things, the following circumstances:

the seriousness of the present charge against the defendant; defendant’s temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Posey, ___ N.C. App. at ___, 757 S.E.2d at 372 (citation and quotation marks omitted).

[T]he question for decision boils down to this: On the basis of the record before us, can we say, as a matter of law and with definite and firm conviction, that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors?

Tolley, 290 N.C. at 369-70, 226 S.E.2d at 369 (citation and quotation marks omitted).

Here, defendant does not argue that the trial court failed to follow the procedure governing the use of restraints at trial under N.C. Gen.

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Stat. § 15A-1031 (2011). *Cf. Simpson*, 153 N.C. App. at 808, 571 S.E.2d at 275 (considering whether failure to follow § 15A-1031 prejudiced defendant and violated his constitutional rights). Outside the presence of the jury, the trial court made the following findings of fact:

[I]n light of the seriousness of the charge, first-degree murder, with the penalty being life imprisonment without the possibility of parole; the fact that the defendant is of a temperament that he sometimes loses his temper, and I have personally seen this in previous hearings as well as his prior attorneys have noted this and reported it to the Court; the defendant's relatively young age and his obvious nimbleness in being able to escape yesterday; the fact that he has made threats to harm others or cause a disturbance in the past, both to his prior attorneys and making statements to others; as well as the nature and physical security of the courtroom; and again, the need to protect those immediately around the defendant from any potential harm, the Court will find that it is necessary to restrain the defendant during the trial.^[2]

After bringing the jury back into the courtroom, the trial court specifically instructed the jury not to consider the use of restraints “in any fashion, whether in terms of weighing the evidence or in determining the defendant's guilt or innocence in this matter.”

Given the facts of this case, we cannot say that the trial court committed a “clear error of judgment” or arbitrarily decided to place defendant in restraints and order additional security personnel to stand by defendant. Defendant escaped in the midst of this trial. Defendant managed to slip out of his leg shackles while being removed from a holding cell, jump over a railing out to the third floor and then over an outdoor breezeway before being apprehended. Defendant had trouble managing his anger; he had previously threatened to harm others. He was facing the most serious charge possible in this state—first degree murder. His potential punishment upon conviction is the second most serious available in North Carolina—life in prison without the possibility of parole. We do not think the fact that defendant broke his ankle during his escape attempt and was in a wheelchair for the rest of the trial makes the court's decision to order additional security measures an abuse of discretion. The trial court must consider not only the potential danger

2. Defendant does not challenge any of these findings as unsupported by the evidence.

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to others in the courtroom from the defendant personally, but also the potential threat that associates of the defendant could pose to the court proceedings and those involved in it.³

We have no difficulty concluding that use of restraints and additional security measures—even though visible to the jury—were fully justified by defendant’s behavior at trial and before trial. *Cf. Tolley*, 290 N.C. at 370-71, 226 S.E.2d at 369 (holding that the trial court did not abuse its discretion in ordering restraints where the defendant had attempted escape during a preliminary hearing one month before trial); *Holbrook v. Flynn*, 475 U.S. 560, 571, 89 L.Ed. 2d 525, 536 (1986) (approving the use of four visible, uniformed troopers in the first row of the courtroom as security where a defendant “had been denied bail after an individualized determination that [his] presence at trial could not otherwise be ensured”).⁴

At oral argument, defendant argued that the trial court’s instruction was insufficient because it failed to inform the jury that they were not to consider the fact that they had been escorted to their cars or the additional security personnel in the courtroom. An instruction specifically addressing the use of escorts for the jury would probably just have led the jurors to believe that the need for use of an escort arose from defendant’s trial and not from some unrelated incident that might have occurred elsewhere in the courthouse. Otherwise, they had no way to know that the security issue of the previous day was related to defendant’s trial until evidence of defendant’s escape was introduced. Indeed, defendant did not request a cautionary instruction specifically regarding the escort. Further, an instruction explicitly mentioning each of the additional security measures would likely just have drawn the jury’s attention to those measures. “If defendant desired a different . . . instruction he should have requested it at that time.” *State v. Hopper*, 292 N.C. 580, 589, 234 S.E.2d 580, 585 (1977); *see Tolley*, 290 N.C. at 371, 226 S.E.2d at 370 (holding that the trial court did not err in failing to instruct the jury to disregard the defendant’s shackles where such an instruction was not requested). Therefore, we hold that the trial court’s instruction not to consider the restraints was sufficient.

3. Concern about threats by associates of the defendant was surely justified in this case, as defendant had, while in jail, attempted to solicit an associate to kill one of the witnesses against him, as discussed in more detail below.

4. Indeed, the United States Supreme Court has approved use of restraints far more prejudicial than those at issue here, in appropriate circumstances. *See Illinois v. Allen*, 397 U.S. 337, 343-44, 25 L.Ed. 2d 353, 359 (1970) (opining that one constitutionally permissible response to “an obstreperous defendant” would be to bind and gag him).

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III. Failure to Individually Inquire

[2] Defendant next argues that the trial court erred and violated his due process rights by failing to individually inquire of the jurors regarding whether they had been affected by the increased security after defendant's escape. We conclude that the trial court's procedure was constitutionally sufficient.

"[W]hen there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Campbell*, 340 N.C. 612, 634, 460 S.E.2d 144, 156 (1995), *cert. denied*, 516 U.S. 1128, 133 L.Ed. 2d 871 (1996). "It is within the discretion of the trial judge as to what inquiry to make." *State v. Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992). The question for us to consider is whether the trial court abused its discretion in directing its inquiry to the jury as a whole rather than the individual jurors.

In *State v. Barts*, the defendant had moved for a mistrial because he feared that the jurors may have read a prejudicial article in the local newspaper. 316 N.C. 666, 681, 343 S.E.2d 828, 838 (1986). The trial court questioned the jury, as a whole, about whether any juror had violated his instructions. *Id.* at 681-82, 343 S.E.2d at 839. The defendant argued on appeal that this method of inquiry was insufficient because the judge did not specifically question each juror. *Id.* at 682, 343 S.E.2d at 839. The Supreme Court held that the chosen method of inquiry was sufficient because "[t]here has been no showing that this mode of questioning was ineffective in ascertaining whether exposure to the article had occurred." *Id.* at 683, 343 S.E.2d at 840.

Here, the only information potentially "conveyed" to the jury was that defendant had attempted to escape.⁵ The jurors were in the jury room when defendant attempted to escape. When the trial court dismissed them for the day, the judge explained that there had been a security incident at the courthouse and that they would be provided an escort to their cars. The trial court specifically instructed the jury not to look at media coverage of what happened at the court. Without exposure to

5. Defendant also argues that the trial court should have inquired about the impact the additional security measures had on the jury. We have already determined that the additional, visible security measures were warranted by defendant's actions at trial and that the trial court's curative instruction was sufficient. "The law presumes that jurors follow the court's instructions." *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004), *cert. denied*, 544 U.S. 909, 161 L.Ed. 2d 285 (2005).

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such media or having witnessed the escape, which none of the jurors did, there is no reason to think that the jurors knew that defendant had escaped and that it was this escape which caused the trial court to order additional security measures.

The only possible exposure to improper, external information concerning defendant's escape attempt would have to come from media coverage. The trial judge had the bailiff question them about whether they had been exposed to any publicity concerning the trial. The judge then followed up with his own inquiry, asking whether they had been exposed to any publicity. None of the jurors indicated that they had.

Under these facts, general inquiry of the jury regarding their exposure to media coverage of the trial was sufficient to ensure that they had not been exposed to improper, prejudicial material. "Additionally, there is no evidence tending to show the jurors were incapable of impartiality or were in fact partial in rendering their verdict." *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008), *cert. denied*, 558 U.S. 851, 175 L.Ed. 2d 84 (2009). Therefore, we hold that defendant is not entitled to a new trial on this basis.

IV. Evidence of Escape Attempt

[3] Defendant next argues that the trial court erred in not excluding evidence of his escape attempt under Rule 403 and in failing to explicitly apply the Rule 403 balancing test.

[W]hether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. This Court will find an abuse of discretion only upon a showing that the trial court's ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.

State v. McDougald, 336 N.C. 451, 457, 444 S.E.2d 211, 214 (1994) (citations, quotation marks, and brackets omitted).

"Evidence of a criminal defendant's flight following the commission of a crime is evidence of his guilt or consciousness of guilt." *State v. Jones*, 347 N.C. 193, 205, 491 S.E.2d 641, 648 (1997). "[A]n escape from custody constitutes evidence of flight." *McDougald*, 336 N.C. at 456, 444 S.E.2d at 214 (citation and quotation marks omitted).

Although defendant persuasively argues that evidence of his escape was highly prejudicial, we fail to see how this evidence was at all unfairly prejudicial. Evidence is generally considered *unfairly* prejudicial when it has "an undue tendency to suggest decision on an improper basis,

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commonly, though not necessarily, as an emotional one.” *Id.* at 457, 491 S.E.2d at 214 (quoting N.C. Gen. Stat. § 8C-1, Rule 403 official commentary). Here, the jury may have inferred from the fact that defendant attempted to escape that defendant was guilty of the charges against him. That inference is precisely the inference that makes evidence of flight relevant and it is not an unfair inference to draw. *See id.*

Defendant does not argue that there is some other unfair inference that the jury might have drawn from the flight evidence. Where there is no unfair prejudice, there is no balancing to be done. Therefore, even assuming *arguendo* that the trial court failed to apply the Rule 403 balancing test explicitly, we conclude that the “evidence of the defendant’s escape . . . ‘could only be viewed as having a *due* tendency to suggest a decision on a *proper basis*.’” *Id.* (quoting *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986)). Therefore, we hold that the trial court did not abuse its discretion in admitting the evidence of defendant’s escape.

V. Gang-Related Evidence

[4] Defendant finally argues that the trial court erred in admitting the jail letter he wrote to Matt Savoy and in allowing the State to ask him on cross-examination whether he was in a gang because that evidence should have been excluded under Rule 403. We disagree.

We review the trial court’s decision to admit the evidence over defendant’s Rule 403 objection for an abuse of discretion. *McDougald*, 336 N.C. at 457, 444 S.E.2d at 214. First, although there was some dispute about its authenticity, the State’s evidence showed that defendant wrote a letter to Matt Savoy wherein defendant asked Mr. Savoy to kill Ronnie Covington because Mr. Covington was talking to police. The letter was written in “Crip code.” Mr. Savoy testified that Crip code is “a language that Crip[s] came up with dealing with writing so it would be coded, so if anybody wasn’t a Crip or affiliated to them, they wouldn’t be able to understand it.”⁶

The letter itself was relevant and not unfairly prejudicial because in it defendant solicited the murder of one of the State’s primary witnesses against him. Such evidence is highly relevant to defendant’s consciousness of guilt. Our Supreme Court has held that “an attempt by a defendant to intimidate a witness in an effort to prevent the witness

6. Defendant has not argued, either before the trial court or on appeal, that Mr. Savoy was not qualified to interpret the letter, nor has defendant challenged the accuracy of Mr. Savoy’s interpretation of the letter.

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from testifying or to induce the witness to testify falsely in his favor is relevant to show the defendant's awareness of his guilt." See *State v. Mason*, 337 N.C. 165, 171, 446 S.E.2d 58, 61 (1994) (citation, quotation marks, and brackets omitted). Soliciting the murder of a witness is "an attempt . . . to prevent the witness from testifying[.]" *Id.* (citation and quotation marks omitted).⁷

Moreover, evidence relating to defendant's gang membership was necessary to understand the context and relevance of the letter. The State properly introduced the letter itself and asked Mr. Savoy, who testified that he could read Crip code, to translate it on the stand.⁸ To understand this evidence, it was important for the jury to know what Crip code is and why defendant would be a person capable of writing in this manner. Additionally, the trial court repeatedly instructed the jury that they were only to consider the gang evidence as an explanation for the note.

Defendant correctly notes that when the prosecutor asked him on cross-examination whether he was a Crip, the trial court overruled his objection without giving a limiting instruction. While it is true that the trial court did not repeat its limiting instruction, no such instruction was requested. Additionally, the question was asked in the context of the prosecutor's cross-examination on the issue of the "Crip code" note. Defendant had denied writing the note and denied even understanding "Crip code." The prosecutor did not encourage the jury to draw an improper inference from this evidence.

In sum, the letter itself was highly relevant and, unlike the cases cited by defendant,⁹ here the evidence of defendant's gang membership was properly relevant to his guilt. Under the facts of this case, such evidence "could only be viewed as having a *due* tendency to suggest

7. Defendant argues that the letter was less probative than it might otherwise be because Mr. Covington was "talking to police" about other offenses that defendant committed as well, such as the string of robberies and defendant did not specify in the letter which testimony he wanted to prevent. So, the argument goes, defendant could have wanted Mr. Covington dead to prevent his testimony in *those* cases instead of at this trial. This argument is nearly so ludicrous that it does not bear addressing. The State's evidence showed that defendant asked someone to murder a primary witness relevant to this trial. The fact that the letter does not specify that defendant wanted him dead for that reason alone does not make it irrelevant to defendant's guilt.

8. Defendant had a full and fair opportunity to cross-examine Mr. Savoy and to impeach him as a biased witness.

9. *E.g.*, *State v. Hinton*, ___ N.C. App. ___, 738 S.E.2d 241 (2013).

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a decision on a *proper basis*.” *McDougald*, 336 N.C. at 456, 444 S.E.2d at 214 (citation and quotation marks omitted). Defendant has failed to show that the trial court abused its discretion in deciding that any unfair prejudice from the contested evidence did not substantially outweigh its probative value.

VI. Conclusion

For the foregoing reasons, we conclude that defendant has shown no error at his trial.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
BILL RAYMOND SIMPSON

No. COA14-103

Filed 5 August 2014

1. Indictment and Information—being a sex offender in a park—subsection of statute not specified—defendant sufficiently appraised of accusation

The trial court had subject matter jurisdiction over a prosecution for being a registered sex offender unlawfully on premises used by minors in violation of N.C.G.S § 14-208.18(a). Although defendant alleged that the indictment failed because the applicable subsection of the statute was not specified, the indictment alleged that defendant was within 300 feet of a batting cage in a park and only one of the three subsections imputed a 300 foot requirement. Additionally, the indictment alleged that defendant was a person required to register as a sex offender and named the location where the purported offense occurred, so that defendant was sufficiently apprised of the nature of the conduct which was the subject of the accusation.

2. Sexual Offenders—presence in park with batting cages—evidence of use primarily intended for minors—insufficient

The trial court erred by denying defendant’s motion to dismiss where he was arrested for being a registered sex offender close to

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batting cages in a park. While batting cages and ball fields may be used by minors, they are not intended primarily for minors absent special circumstances shown by the State. Here, the State's evidence rose only to a level of conjecture or suspicion that the batting cages and ball field were locations primarily intended for the use, care, and supervision of minors.

On writ of certiorari, defendant appeals from judgment entered 19 September 2012 by Judge R. Stuart Albright in Wilkes County Superior Court. Heard in the Court of Appeals 3 June 2014.

Attorney General Roy Cooper, by Assistant Attorney General Laura Edwards Parker, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for defendant.

ELMORE, Judge.

Bill Raymond Simpson ("defendant") appeals his conviction of being a registered sex offender unlawfully on premises used by minors in violation of N.C. Gen. Stat. § 14-208.18(a) (2013). Defendant's appeal is before us on writ of certiorari. Defendant argues that his indictment is fatally defective and that the trial court erred in denying his motion to dismiss. After careful review, we hold that defendant's indictment was not fatally defective. However, we agree that the trial court erred in denying defendant's motion to dismiss. Accordingly, we reverse the order denying defendant's motion to dismiss.

I. Background

Defendant is a registered sex offender based on his convictions for second degree rape and felony incest in 1997. Consequently, defendant is to maintain registration on the North Carolina Sex Offender and Public Protection Registry. The State's evidence at trial tended to establish the following: On 2 September 2011, defendant went to Cub Creek Park in Wilkesboro, North Carolina ("the park" or "Cub Creek Park"). The park is a public park in Wilkesboro that features walking trails, ball fields, swings, jungle gyms, picnic areas, a dog park, a stream, a community garden, and batting cages. Defendant was sitting on a bench within the premises of the park, facing and in close proximity to the park's batting cage and ball field. Sergeant Kenneth Coles ("Sergeant Coles"), a neighbor of defendant and off-duty police officer with the Wilkesboro Police

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Department, saw defendant. Because he knew that defendant was a registered sex offender, Sergeant Coles notified the police department of defendant's presence near the batting cage. Major Steve Dowell ("Major Dowell") responded to the call and arrived at the park, where he placed defendant under arrest for violating N.C. Gen. Stat. § 14-208.18(a)(2). Section 14-208.18(a)(2) prohibits registered sex offenders from being "[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors[.]"

Defendant was indicted by superseding indictment for violating N.C. Gen. Stat. § 14-208.18(a)(2) and attaining habitual felon status on 23 July 2012. The matter came on for trial on 19 September 2012. The jury found defendant guilty of violating N.C. Gen. Stat. § 14-208.18(a)(2), and the State dismissed the habitual felon charge. The trial court sentenced defendant to a minimum of 19 months to a maximum of 23 months imprisonment. Defendant now appeals.

II. Analysis**A. Defective Indictment**

[1] Defendant argues that the trial court lacked subject matter jurisdiction over this case because the indictment charging him with violating N.C. Gen. Stat. § 14-208.18(a) failed to allege an essential element of the offense—that the batting cages and ball field were located on a premise *not* intended primarily for the use, care, or supervision of minors. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-924(a)(5)(2013), a valid indictment must contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." An indictment "is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner." N.C. Gen. Stat. § 15-153 (2013). "[T]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused[.]" *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984). The trial court need not subject the indictment to "hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of

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the statute, either literally or substantially, or in equivalent words.” *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).

“[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). This Court “review[s] the sufficiency of an indictment *de novo*.” *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *cert. dismissed*, 366 N.C. 405, 735 S.E.2d 329 (2012). “An arrest of judgment is proper when the indictment ‘wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty.’” *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)). “The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.” *State v. Marshall*, 188 N.C. App. 744, 752, 656 S.E.2d 709, 715 (2008) (quoting *State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966)).

The superseding indictment, by which the Grand Jury charged defendant with violating N.C. Gen. Stat. § 14-208.18(a), alleged that

the defendant named above unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the General Statutes to register as a sex offender and having been previously convicted of an offense in Article 7A of Chapter 14 of the General Statutes, be within 300 feet of a location intended primarily for the use, care, or supervision of minors, to wit: a batting cage and ball field of Cub Creek Park located in Wilkesboro, North Carolina.

In North Carolina, it is unlawful for a person required to register as a sex offender under Chapter 14, Article 27A to knowingly be in any of the following locations:

- (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children’s museums, child care centers, nurseries, and playgrounds.
- (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are **not** intended primarily for

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the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

N.C. Gen. Stat. § 14-208.18(a) (2013) (emphasis added).

Here, both the original indictment and the superseding indictment charged defendant with violating N.C. Gen. Stat. § 14-208.18(a) but neither specified whether it was under subsection (1), (2), or (3). Quoting *State v. Daniels* in his brief, defendant calls our attention to the fact that the three subsections of N.C. Gen. Stat. § 14-208.18(a) present “three distinct scenarios in which a defendant may unlawfully be on certain premises[,]” thus creating three distinct crimes. *State v. Daniels*, ___ N.C. App. ___, ___, 741 S.E.2d 354, 360 (2012), *appeal dismissed, review denied*, 366 N.C. 565, 738 S.E.2d 389 (2013). Defendant notes that (a)(1) prohibits an offender from being in a place intended primarily for the use, care, or supervision of minors. It does not impute a 300 feet requirement. Alternatively, (a)(2) prohibits an offender from being within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are *not* intended primarily for the use, care, or supervision of minors. Defendant contends that the indictment is “confusing” as “it reads like it is either alleging (a) (1) incorrectly, imputing a 300 foot radius where that is not an element of the offense, or simply incompletely alleging (a)(2)” because the park is not defined as a location *not* intended primarily for the use, care, or supervision of minors. Given that the indictment “does not plainly or lucidly reveal the crime [defendant] was accused of committing[,]” defendant argues that it “is fatally defective and the judgment entered thereon must be vacated.”

We are not persuaded. It is clear from the indictment that defendant was charged with violating N.C. Gen. Stat. § 14-208.18(a)(2). The essential elements of the offense defined in N.C. Gen. Stat. § 14-208.18(a)(2) are that the defendant was knowingly (1) within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors and (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense

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involving a victim who was under the age of sixteen at the time of the offense.

Notably, only one of three subsections of N.C. Gen. Stat. § 14-208.18(a) imputes a 300 feet requirement, and that is (a)(2). Here, the indictment alleges that defendant, who is a person required to register as a sex offender, came “within 300 feet of a location intended primarily for the use, care, or supervision of minors, to wit: a batting cage and ball field[.]” It also specifies that ball fields and batting cages were located in Cub Creek Park in Wilkesboro. The inclusion of the language “within 300 feet” should have been sufficient to put defendant on notice that he was charged with violating N.C. Gen. Stat. § 14-208.18(a)(2). Additionally, because the indictment also alleged that defendant was a person required by Article 27A of Chapter 14 to register as a sex offender and named Cub Creek Park as the location where the purported offense occurred, we hold that defendant was sufficiently apprised of the nature of the conduct which was the subject of the accusation. *See* N.C. Gen. Stat. § 15A-924(a)(5) (2013). The fact that the indictment did not allege that the park was a location not primarily intended for the use, care, or supervision of minors does not render the indictment fatally defective on these facts. Accordingly, the indictment was sufficient to confer subject matter jurisdiction upon the trial court.

B. Motion to Dismiss

[2] Defendant next asserts that the trial court erred in denying his motion to dismiss. Defendant specifically argues that the State failed to present substantial evidence that the batting cages and ball fields constituted locations that were primarily intended for use by minors. We agree.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). To defeat a motion to dismiss, the State must present “substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007) (citation and quotation marks omitted). In considering a motion to dismiss, the court must look at the evidence in the light most favorable to the State. *Id.* at 665, 652 S.E.2d at 213. “A motion to dismiss should be granted, however, when the facts and circumstances warranted by the evidence do no more than

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raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt." *State v. McDowell*, 217 N.C. App. 634, 636, 720 S.E.2d 423, 424 (2011) (quotation marks and citation omitted).

Pursuant to § 14-208.18(a)(2), the State has the burden to present substantial evidence that defendant: (1) knowingly was within 300 feet of a location *intended primarily* for the use, care, or supervision of minors that is part of a place which is not intended for the use, care, or supervision of minors, including property open to the general public; and (2) at a time when he was required to register as a sex offender based on a conviction for any offense in Article 7A of Chapter 14 of the North Carolina General Statutes or any offense where the victim of the offense was under the age of 16 years at the time of the offense. (emphasis added). Defendant does not challenge the State's evidence as to the second element; his only contention is that the State failed to present substantial evidence that the batting cages and ball field were primarily intended for use by minors.

Section (a)(1) gives guidance to help determine what qualifies as a location "intended primarily" for minors, mentioning places "including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds." N.C. Gen. Stat. § 14-208.18(a)(1). While batting cages and ball fields *may* be used by minors, they are not *intended primarily* for minors absent special circumstances shown by the State. Here, the State failed to offer substantial evidence that the batting cages and ball field in the park were primarily intended for children. Officer Kerr testified that "[m]y stepson plays baseball at Cub Creek Park. They also have swing sets and playground type equipment there." Kerr's testimony regarding the fact that the park includes playground equipment is irrelevant since defendant was not charged with being within 300 feet of that equipment, and we have no way of knowing where that equipment is in reference to the benches by the ball field where defendant was found. Furthermore, Kerr's testimony that his stepson plays at Cub Creek Park has no bearing on whether the ball field and batting cages were "intended primarily" for use by minors because it is unclear how old his stepson is and whether he is even a minor. In fact, the trial court pointed this out to the State, noting that the State's witnesses failed to "specify how old their children were. You didn't say whether they were minors, whether they were adults or whether they were children. But they have to be minors, they just can't be children. If they're 19, they're not minors."

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Sergeant Coles also testified about who uses the batting cages and ball field, noting that “[y]ou have several ball fields where very minor small children play, as well as teenagers and even adults[.]” Moreover, Sergeant Coles claimed that his son plays there on occasion. However, once again, the State elicited no evidence as to how old Sergeant Coles’s son was at the time of trial. Furthermore, Coles’s testimony that not only children play at the park but also “teenagers and even adults” contravenes the State’s assertion that the ball field and batting cages were intended primarily for minors. Sergeant Coles’s testimony that on the date of the offense there were some “young kids” in a line for the batting cage, estimated at eight to thirteen years old, similarly fails to establish that the location was intended primarily for use by minors. Based on the State’s logic, the entire park would be off limits—as would countless other municipal sites which are visited by both adults and children that are sometimes used by minors as well as adults.

In sum, the testimony of Deputy Kerr and Sergeant Coles did not amount to evidence that the ball field and batting cages of the park were *intended primarily* for the use of minors. Instead, at most, their testimony established that these places were sometimes used by minors. Thus, we hold that the State’s evidence rises only to a level of conjecture or suspicion that the batting cages and ball field were locations *primarily intended* for the use, care, and supervision of minors and we would reverse the order denying defendant’s motion to dismiss.

III. Conclusion

We conclude that the indictment returned against defendant for the purpose of charging him with violating N.C. Gen. Stat. § 14-208.18(a)(2) was sufficient to confer subject matter jurisdiction upon the trial court. However, the State failed to present substantial evidence that the ball field and batting cages of the park were “intended primarily for the use, care, or supervision of minors,” as required by N.C. Gen. Stat. § 14-208.18(a)(2). Accordingly, we reverse the order denying defendant’s motion to dismiss.

Reversed.

Judges McGEE and HUNTER, Robert C., concur.

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DANIEL JOSEPH TRUHAN, PLAINTIFF-APPELLEE

v.

SUSAN P. WALSTON AND DAVID M. WALSTON, DEFENDANTS AND
THIRD-PARTY PLAINTIFF-APPELLANT SUSAN P. WALSTON

v.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, UNITED
SERVICES AUTOMOBILE ASSOCIATION, AND WESTERN SURETY COMPANY,
THIRD-PARTY DEFENDANTS

No. COA14-43

Filed 5 August 2014

1. Police Officers—automobile accident—negligence action—summary judgment for officer—erroneous

In an automobile accident case involving a collision between a speeding officer and a car pulling out from a side road, the trial court's grant of summary judgment for plaintiff (the officer) was reversed and the case was remanded for further action on defendant's counter-claims. Plaintiff was responding to a request for traffic control at the scene of a minor accident involving no injuries and, considering a number of other factors such as the terrain, the speed limit, the population and the time of day of the pursuit, there was a high probability of injury to the public despite the absence of significant law enforcement benefits.

2. Immunity—governmental—police officer in car accident—immunity not available

In an automobile accident case involving a collision between a speeding officer and a car pulling out from a side road, summary judgment for the officer and the insurance companies would have been improper on the basis of governmental immunity, at least as to potential damages up to the amount of a \$25,000.00 bond. Furthermore, it has been recognized that actions brought pursuant to N.C.G.S. § 20-145 fall outside the general rule of governmental immunity.

Appeal by Defendant and Third-Party Plaintiff Susan P. Walston from orders entered 7 October 2013 and 4 November 2013 by Judge Kendra D. Hill in Superior Court, Wayne County. Heard in the Court of Appeals 6 May 2014.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bryan T. Simpson and Natalia K. Isenberg, for Daniel Joseph Truhan, Plaintiff-Appellee and Western Surety Company, Third-Party Defendant-Appellee.

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Poyner Spruill LLP, by Timothy W. Wilson, for North Carolina Farm Bureau Mutual Insurance Company, Third-Party Defendant-Appellee.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for United Services Automobile Association, Third-Party Defendant-Appellee.

Whitley Law Firm, by Ann C. Ochsner, for Susan P. Walston, Defendant and Third-Party Plaintiff-Appellant.

McGEE, Judge.

We review an order from the trial court that (1) granted summary judgment in favor of Daniel Joseph Truhan (“Plaintiff”), Western Surety Company (“Western Surety”), North Carolina Farm Bureau Mutual Insurance Company (“Farm Bureau”), and United Services Automobile Association (“United Services”) (collectively, “Third-Party Defendants”); (2) dismissed all counterclaims, and third-party claims of Defendant Susan P. Walston (“Defendant”); and (3) denied the motion for summary judgment filed by Defendant, Defendant David M. Walston, and unnamed Defendant Argonaut Great Central Insurance Company (“Argonaut”). Therefore, the following recitation of the “facts” presents the evidence that was before the trial court in the light most favorable to Defendant and ignores evidence favorable to Plaintiff. *Peter v. Vullo*, __ N.C. App. __, __, 758 S.E.2d 431, 434 (2014) (for summary judgment “the evidence presented by the parties must be viewed in the light most favorable to the non-movant”) (citations omitted).

The following is the evidence taken in the light most favorable to Defendant. The North Carolina Highway Patrol (“Highway Patrol”) received a call from Kaye Howell (“Ms. Howell”), a witness to a two-vehicle accident, at approximately 7:08 a.m. on 30 December 2009. Ms. Howell then called Wayne County Communications to report the accident, and to inform them that no emergency services were needed because there had been no injuries. The Highway Patrol also called Wayne County Communications to report the accident and also informed them that there were no injuries. However, the Highway Patrol did inform Wayne County Communications that the accident was on a curve in the road and a trooper could not get to the scene right away; therefore, traffic control was needed. Ms. Howell called Wayne County Communications again to inform them that a woman who was

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involved in the accident was arguing with a man she apparently knew, who had arrived at the scene, and that the woman had pushed the man. Ms. Howell asked for the estimated time of arrival of the dispatched deputy, because the woman was “getting a little bit out of hand.” However, Joshua Carroll, who was also involved in the accident, stated: “At no time while I was present at the scene of the collision did I observe any physical violence by anyone.”

Plaintiff was a deputy for the Wayne County Sheriff’s Office. He was leaving a Kangaroo Express located at Highway 117 and Carolina Commerce Drive in Goldsboro on 30 December 2009. Plaintiff overheard the call from the Highway Patrol to Wayne County Communications requesting that a Wayne County deputy respond to the accident and provide traffic control. Plaintiff indicated to Wayne County Communications that he was free, closer to the accident, and could respond. Plaintiff received the okay to respond to the accident at approximately 7:19 a.m. About one minute later, Wayne County Communications began receiving calls of a second accident involving injuries at Highway 117 North and Woodview Drive, approximately one and one-half miles from the Kangaroo Express. This second accident involved Plaintiff and Defendant.

At the time of the accidents, Plaintiff had been working as a deputy for just under three years. Plaintiff was a warrant officer and spent his days serving warrants. Plaintiff only responded to calls when no patrol deputy was available, or there was some other circumstance that warranted departure from Plaintiff’s usual duties. Before becoming a deputy, Plaintiff had worked briefly for the Goldsboro Police Department as a school resource officer. Plaintiff explained his “skill, ability, and training” for high speed driving as follows:

I know my limitations of driving. I know when I’m on the limits of traction or handling a vehicle. Everybody – you know if you’re going into a curve whether you’re going too fast. You can – it’s a perception thing. It’s not something I can quantify to you. At no time during that time did I feel that I had exceeded my ability to control that vehicle.

Plaintiff had received no training for emergency driving beyond the Basic Law Enforcement Training certification curriculum he had taken at Wayne Community College in 2004.

Wayne County Sheriff’s Office policy recognizes three kinds of police driving:

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Emergency Response Driving: is driving to the scene of a call where there may be a danger to life, or a threat to officer safety, or reported violence or threat of imminent violence.

Pursuit Driving: is the attempt to apprehend a person subject to arrest who is fleeing in a vehicle, and includes “catch up” driving for traffic enforcement purposes before a violator attempts to flee.

Routine driving: is all on-duty driving other than “emergency response driving” [or] “pursuit driving” and includes routine patrol, service of warrants, transportation of prisoners, going to location of non-emergency calls, or other driving in performance of duty.

POLICY TITLE: Emergency Response & Vehicle Pursuits, Wayne County Sheriff's Office General Order (Revised January 7, 2002).

According to the evidence most favorable to Defendant, in the approximately one to two minutes between the time Plaintiff received the call regarding the first accident and the time Plaintiff and Defendant were involved in the second accident, the following occurred. Plaintiff headed north on Highway 117, passed an exit that connected with Interstate 95, passed a school, and passed a fire station before he reached the intersection of Highway 117 and Woodview Drive. The fire station was about three tenths of a mile south of Woodview Drive. At some point before his collision with Defendant, Plaintiff activated his blue lights, but he did not activate his siren. Trooper L. J. Bunn (“Trooper Bunn”) of the Highway Patrol, who investigated the accident, believed the speed limit along part of that section of the road was thirty-five miles per hour (“mph”).

According to a collision analysis report produced by Collision Analyst William J. Kluge, Jr., along that mile-and-a-half section of road, Plaintiff reached speeds over one hundred mph, passed automobiles traveling both north and south, and had his accelerator fully depressed at times. The speed limit at the site of the accident was forty-five mph. Four and one-half to five seconds before the collision, Plaintiff was traveling eighty-six to eighty-seven mph, and was accelerating. Plaintiff was maintaining full throttle acceleration “for at least a couple of seconds when [Defendant's truck] would have come into view[,]” and maintained full throttle acceleration until approximately one-half second before the impact, at which time Plaintiff removed his foot from the accelerator and began to depress the brake. Plaintiff was traveling approximately

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ninety-five mph at the time of impact. Plaintiff “should have been on alert and noticed [Defendant’s truck] before [Defendant] began to make her turn and [should have] adjusted his speed accordingly.”

Continuing with evidence presented in the light most favorable to Defendant, Defendant left her house on Woodview Drive, a residential street, shortly after 7:00 a.m. on 30 December 2009. As Defendant approached the intersection of Woodview Drive and Highway 117, she slowed down, and came to a complete stop at the stop sign. Defendant pulled forward to obtain a better view up and down Highway 117, and again stopped. Defendant looked to the left, looked to the right, looked back to the left, and then pulled onto Highway 117, initiating a left-hand turn onto Highway 117 South. Before Defendant pulled onto Highway 117, she did not see any vehicles coming from the left, but did see a truck coming from the right, which turned into a drive, then Defendant looked to the left again and saw no vehicles. As Defendant “made [her] effort to leave the stop sign, there was nobody to the left.” As Defendant was entering the southbound lane of Highway 117, she saw blue lights out of the corner of her eye and was immediately hit by Plaintiff’s cruiser.

Both Plaintiff and Defendant were seriously injured in the accident. Plaintiff filed his complaint on 29 February 2012, alleging that Defendant was negligent, and that Defendant’s negligence caused the accident and Plaintiff’s injuries. Plaintiff also brought suit against Defendant’s husband, David M. Walston, pursuant to “the Family Purpose Doctrine.” Defendant answered and counterclaimed on 23 May 2012. Defendant denied that any negligence on her part caused the accident, alleged that Plaintiff’s negligence was responsible for her injuries, and requested both compensatory and punitive damages. Defendant filed a “Motion for Leave to Amend Counterclaim and File Third Party Complaint” against Farm Bureau, United Services, and Western Surety, Third-Party Defendants, on 14 December 2012. Defendant’s motion was granted by order filed 21 December 2012.

Plaintiff answered Defendant’s amended counterclaim and third-party complaint on 31 Jan 2013, and pleaded the affirmative defenses of governmental immunity and contributory negligence. Plaintiff and Western Surety moved for summary judgment against Defendant on 20 June 2013, arguing that Defendant’s counterclaims should fail as a matter of law. Farm Bureau filed a motion for summary judgment on 25 June 2013, and United Services filed a motion for summary judgment on 9 July 2013. Defendant, along with David M. Walston and Argonaut, filed a motion for summary judgment on 8 August 2013. The trial court, in an order entered 7 October 2013, granted summary judgment in favor

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of Plaintiff, Western Surety, Farm Bureau, and United Services “as to all claims, counterclaims and/or third-party claims asserted against them by Defendant[.]”

In that same order, the trial court denied the motion for summary judgment filed by Defendant, David M. Walston, and Argonaut. On 4 October 2013, Defendant filed a Motion for Reconsideration of the grant of summary judgment in favor of Plaintiff, Western Surety, Farm Bureau, and United Services or, in the Alternative, for Certification of Order as a Final Judgment. By order entered 4 November 2013, the trial court denied Defendant’s motion for reconsideration, but granted Defendant’s motion for certification pursuant to Rule 54(b), whereby the trial court certified as a final judgment the order granting summary judgment in favor of Plaintiff, Western Surety, Farm Bureau, and United Services. Defendant appeals.

I.

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.”

The moving party bears the burden of establishing the lack of a triable issue of fact. If the movant meets its burden, the nonmovant is then required to produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

Peter, __ N.C. App. at __, 758 S.E.2d at 434 (citations omitted). “[I]ssues of negligence are generally not appropriately decided by way of summary judgment, [unless] there are no genuine issues of material fact, and an essential element of a negligence claim cannot be established[.]” *Greene v. City of Greenville*, __ N.C. App. __, __, 736 S.E.2d 833, 835, *disc. review denied*, __ N.C. __, 747 S.E.2d 249 (2013).

II.

[1] In Defendant’s first argument, she contends the trial court erred in granting summary judgment in favor of Plaintiff because her “forecast of the evidence establishes a genuine issue of material fact regarding [Plaintiff’s] gross negligence.” We agree.

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Defendant argues that N.C. Gen. Stat. § 20-145, which allows police officers to exceed the posted speed limit in certain situations, applied to Plaintiff on the morning of the accident, but that, because Plaintiff's conduct rose to the level of gross negligence, Defendant should recover in negligence from Plaintiff. N.C. Gen. Stat. § 20-145 states:

The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances and rescue squad emergency service vehicles when traveling in emergencies, nor to vehicles operated by county fire marshals and civil preparedness coordinators when traveling in the performances of their duties. *This exemption shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.*

N.C. Gen. Stat. § 20-145 (2011) (emphasis added).¹ This Court has discussed relevant factors in the N.C. Gen. Stat. § 20-145 analysis as pertains to pursuit as follows:

N.C. Gen. Stat. § 20-145 exempts police officers from speed laws when pursuing a law violator. However, the exemption “does not apply to protect the officer from the consequence of a reckless disregard of the safety of others.” Our Supreme Court has held that “an officer’s liability in a civil action for injuries resulting from the officer’s vehicular pursuit of a law violator is to be determined pursuant to a gross negligence standard of care.” Grossly negligent behavior is defined as “wanton conduct done with conscious or reckless disregard for the rights and safety of others.” . . .

When determining whether an officer’s actions constitute gross negligence, we consider: (1) the reason for the pursuit, (2) the probability of injury to the public due to the officer’s decision to begin and maintain pursuit, and (3) the officer’s conduct during the pursuit.

1. N.C. Gen. Stat. § 20-145 was amended effective 1 October 2013. We cite to the version in effect at the time of the collision.

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Relevant considerations under the first prong include whether the officer “was attempting to apprehend someone suspected of violating the law” and whether the suspect could be apprehended by means other than high speed chase. . . .

When assessing prong two, we look to the (1) time and location of the pursuit, (2) the population of the area, (3) the terrain for the chase, (4) traffic conditions, (5) the speed limit, (6) weather conditions, and (7) the length and duration of the pursuit.

. . . .

Under the third prong we look to [the officer’s] conduct during the pursuit. Relevant factors include (1) whether an officer made use of the lights or siren, (2) whether the pursuit resulted in a collision, (3) whether an officer maintained control of the cruiser, (4) whether an officer followed department policies for pursuits, and (5) the speed of the pursuit.

Greene, __ N.C. App. at __, 736 S.E.2d at 835-36 (citations omitted). We believe similar factors are useful in evaluating an officer’s conduct when “emergency response driving” to the scene of an incident, as well.

We note — absent knowledge that there is a reasonable risk of death, serious bodily injury, or some other grave threat — that the need for an officer to engage in emergency response driving is not as apparent as when engaging in a vehicle pursuit. A vehicle fleeing at high speed constitutes, by its very nature, a great risk of death or injury to multiple persons. When engaged in a pursuit, an officer often must drive at high speed to maintain contact with the fleeing vehicle. Of course, an officer must still engage in risk analysis and cease pursuit if the risk of harm to others becomes too great. *Id.* The justification for an emergency response to the scene of an incident may not be as immediately apparent.

We will view the three factors stated in *Greene* in the light most favorable to Defendant:

A. The reason for the pursuit

Plaintiff was responding to a request for traffic control at the scene of a minor accident involving no injuries. Though a witness informed Wayne County Communications that a woman was arguing with a man and had pushed him, and though Plaintiff testified he was concerned

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there was a “violent” situation in the vicinity of a school, there is no evidence in the audio recording from that morning that Plaintiff was ever informed of any disturbance. Therefore, we do not consider the disturbance in our summary judgment analysis, as it is for the trier of fact to resolve the issue of whether Plaintiff was aware of the disturbance prior to his collision with Defendant. However, even assuming *arguendo* Plaintiff was aware of the disturbance, there is no evidence that the disturbance was serious, or that anyone was in danger of being injured, much less seriously injured. Plaintiff admitted that he did not believe there was any officer safety issue involved. Investigating officer Lieutenant Carter Hicks (“Lieutenant Hicks”), of the Wayne County Sheriff’s Office, testified that policy dictates, even in emergency response situations, that officers must “drive in due regards to the safety of others[;]” that this policy applies to all driving, not just pursuits, and that he considers “domestic violence calls[,] unless there’s a life-threatening situation involved[,]” to be non-emergency response situations. Lieutenant Hicks testified that the situation involving Plaintiff required Plaintiff to “balance the need to pursue or apprehend a violator against the risk of damage to property or injury to persons.” “Deputies . . . must always be aware that their first obligation is to protect the public.” Policy dictated that Plaintiff had to evaluate the reason for the emergency response “and seriousness of the suspected violation.” Blair Tyndall (“Mr. Tyndall”), the Director of Emergency Medical Services and Safety for Wayne County, testified that Plaintiff, when deciding how fast to proceed to the accident site, should have weighed the fact that he was “responding to a motor vehicle accident that had already occurred.” Mr. Tyndall “felt” like Plaintiff was not following “due regard there under [N.C. Gen. Stat. § 20-145] for safety to others.” Mr. Tyndall also believed Plaintiff was in violation of Wayne County Emergency Response and Vehicle Pursuit Policy that stated: “Driving that is a wanton and reckless disregard for safety of others is illegal and never justified by any emergency, no matter how serious.” Mr. Tyndall understood that emergency response driving could be justified when “driving to the scene where there may be a danger to life, or a threat to officer’s safety, or reported violence or threat of imminent violence[,]” but he “was not aware that there was any of those occurring at the accident [Plaintiff] was responding to.” In Mr. Tyndall’s opinion, Plaintiff was “operating unsafely[.]”

B. The probability of injury to the public due to Plaintiff’s decision to begin and maintain emergency response driving

(a) Time and location of the pursuit. Plaintiff began his high-speed response at approximately 7:19 in the morning, and crashed a minute or

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two later. This was a time when people were generally heading to work, and children were heading to school. It is uncertain from the evidence presented whether school was in session at the time of the accident, but Plaintiff testified that he believed it was. Along that section of Highway 117 are located a school, an on/off ramp for a nearby interstate, a fire station, and multiple residential driveways and side streets. Although that section of Highway 117 was not heavily developed, Defendant was pulling out of a residential neighborhood onto Highway 117 when Plaintiff's vehicle impacted her vehicle.

(b) The population of the area. The area was not densely populated, but there was a mix of residential, commercial, and governmental buildings along the highway. Highway 117 also connects Goldsboro with Pikeville and other towns.

(c) The terrain for the chase. Highway 117 is mostly flat, but has some curves in the section on which Plaintiff was traveling on the morning of 30 December 2009. There was "a right-hand curve that ended about 2/10th of a mile south of the intersection" of Highway 117 and Woodview Drive. A witness, who Plaintiff passed while driving north on Highway 117, stated there was a line of trees that prevented the witness from seeing Defendant's vehicle until Defendant's vehicle began to pull out onto Highway 117.

(d) Traffic conditions. There is no evidence suggesting heavy traffic on Highway 117 at the time of the accident, but there were a number of automobiles in the area. One witness stated that Plaintiff passed him as they were both traveling north on Highway 117. Another, heading south, passed Plaintiff, and then saw the collision in his rear-view mirror. Two other witnesses in separate vehicles were very near the scene of the accident when it happened, one of whom considered honking her horn to warn Defendant not to pull out, but worried that might cause more harm by making Defendant hesitate.

(e) The speed limit. The speed limit was forty-five mph. Trooper Bunn believed the speed limit was thirty-five mph just south of where the accident occurred. Plaintiff was traveling at speeds over one hundred mph, and was accelerating at a speed of approximately ninety-five mph immediately before the collision.

(f) Weather conditions. There is no evidence of adverse weather conditions; however, it was early morning in winter.

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C. Plaintiff's conduct during the pursuit

When considering the evidence in the light most favorable to Defendant, we have to assume that Plaintiff failed to activate his siren. Trooper Bunn testified that Plaintiff should have had his lights and siren on, and that it is a violation for any law enforcement vehicle to initiate emergency driving without activating both. Trooper Bunn explained: "I mean, as far as traffic hazard; somebody pull out in front of you, they will know you're coming. If you got your blue lights on, they're not going to hear your siren – I mean, know you're coming until you're right there on them." Lieutenant Hicks testified that Plaintiff was required to notify Communications that he was initiating emergency response driving, but Plaintiff failed to notify and "identify that he [was] running an emergency response of some sort[.]" Plaintiff was traveling at speeds that prevented him from utilizing the "four-second path of travel rule," and the "industry standards for visual lead time." According to the Basic Law Enforcement Training Driver Training manual: "The four-second path of travel is the vehicle's immediate path of travel. When you consider a four-second path of travel, you have time to take an escape route, or you have sufficient stopping distance from any object that may appear in your path of travel." Further:

A visual lead time of twelve (12) seconds in rural areas . . . provides officers with needed time to appropriately select an immediate path of travel. It also gives officers time to search the areas beside the road, adjust their speed, or to make lane changes well in advance of any problems."

Plaintiff "did not consider the residential homes along [Highway] 117 during his emergency response" and therefore "failed to consider the number of intersections (public streets, residential driveways, etc.)." Plaintiff could not recall traffic conditions at the time of the accident, and was not monitoring his speed. Plaintiff was accelerating out of a curve at the time the accident occurred. "It is reasonable to believe that [Plaintiff] experienced tunnel vision." "The effectiveness of the eyes' central and peripheral visions is reduced and becomes more narrow and blurred as the vehicle's speed is increased." Plaintiff should have been able to see Defendant's vehicle as he approached, but he did not. Plaintiff should have been operating at a speed allowing him to brake or take evasive action to avoid the collision with Defendant's vehicle, but he was not. According to Collision Analyst Kluge, had Plaintiff been traveling at a speed at or below seventy-four mph, the collision would not have occurred. Trooper Bunn testified that he could not recall why he had not charged Plaintiff for not engaging his siren or for excessive

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speed, but he opined: “I think he could have been at a lower speed, I mean, going to an accident.” “I’d say [Plaintiff should have been going] 55 or 60 at the most. I mean, it was a [property damage] wreck. It wasn’t no life-and-death situation there.” In his Safety Director’s Report, Mr. Tyndall stated that Plaintiff was “in violation of the sheriff’s department standing policy for vehicle use and response. This is also [Plaintiff’s] second incident in 2009 with a motor vehicle collision. Recommend appropriate disciplinary action and remedial law enforcement drivers training.” Mr. Tyndall believed Plaintiff was not operating his vehicle with “due regard for safety” and was exhibiting “a wanton and reckless disregard for safety of others[.]”

This Court addressed a similar situation in *Jones v. City of Durham*, 168 N.C. App. 433, 608 S.E.2d 387 (“*Jones I*”), *aff’d*, 360 N.C. 81, 622 S.E.2d 596 (2005), *opinion withdrawn and superseded on reh’g*, 361 N.C. 144, 638 S.E.2d 202, *and reversed in part based upon dissenting opinion*, 361 N.C. 144, 638 S.E.2d 202 (2006) (“*Jones II*”), together with *Jones I*, (“*Jones*”). The facts in *Jones* were as follows:

[A]t approximately 9:00 a.m., Officer Tracy Fox (“Officer Fox”) was dispatched to investigate a domestic disturbance[.] Soon after arriving at the scene, Officer Fox determined that she would need assistance and called for backup. Dispatch, upon receiving her call, issued a “signal 20” requiring all other officers give way for Officer Fox’s complete access to the police radio by holding all calls. Officer Joseph M. Kelly (“Officer Kelly”[D]) was approximately 2½ miles from [the disturbance], as were fellow Officers H.M. Crenshaw (“Officer Crenshaw”) and R.D. Gaither (“Officer Gaither”).

In response to the first call by Officer Fox, Officers Kelly, Crenshaw, and Gaither got in their separate vehicles and began driving towards [the disturbance]. Officer Fox then made a second distress call, stating with a voice noticeably shaken, that she needed more units. Officers Kelly and Crenshaw activated their blue lights and sirens and increased the speed of their vehicles[.] Officer Gaither took a different route.

At approximately 9:09 a.m. on the same morning, Linda Jones (“plaintiff”) was leaving her sister’s apartment complex at the southwest corner of the intersection of Liberty Street and Elizabeth Street (“the intersection”). The posted speed limit for motorists traveling upon Liberty

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Street was 35 miles per hour. At the curb of Liberty Street, plaintiff observed no vehicles approaching, but heard sirens coming from an undeterminable direction. A bystander outside the apartment complex also heard the sirens, but could not determine their direction. Plaintiff, some 95 feet west of the intersection, began to cross Liberty Street outside of any designated cross walk and against the controlling traffic signal. At this point in the road, Liberty Street had three undivided lanes: two eastbound lanes (the second or middle eastbound lane was for making northbound right turns only) and a westbound lane. Reaching the double yellow lines dividing the two eastbound lanes which she crossed, plaintiff first saw a police vehicle heading towards her in the westbound [lane]. The vehicle came over the railroad tracks on the eastern side of the intersection. Sergeant Willie Long, an eyewitness who was in his vehicle at the corner of Grace Drive and Liberty Street, and plaintiff both observed Officer Kelly's vehicle go completely airborne over the railroad tracks. Once his vehicle crossed the railroad tracks, defendant saw plaintiff at a distance of between 300-332 feet and standing at the double-yellow lines.

Plaintiff turned and began running back in the direction from which she came, across the two eastbound lanes. Officer Kelly, crossing the intersection and accelerating, turned his vehicle with one hand into the eastbound lanes and struck plaintiff on her side as she was retreating to the curb. She was launched six feet into the air over the vehicle and landed in a gutter approximately 76 feet down along the eastbound lane of Liberty Street. Officer Kelly's vehicle traveled approximately 160 feet after striking plaintiff and came to a complete stop in the eastbound lane of Liberty Street. Plaintiff suffered severe injuries.

While Officer Kelly was en route to Officer Fox's two distress calls, he was aware at least four other officers were responding. . . . [A]n accident reconstruction expert determined Officer Kelly's speed to have varied between 55 and 74 miles per hour.

Jones I, 168 N.C. App. at 434-35, 608 S.E.2d at 388-89. This Court held that, on these facts, the "plaintiff has not forecast sufficient evidence to show a genuine issue of material fact as to gross negligence on the part

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of Officer Kelly, [and that] defendants are entitled to judgment as a matter of law.” *Jones I*, 168 N.C. App. at, 443, 608 S.E.2d at 393. The Court in *Jones I* reasoned:

In response to Officer Fox’s two distress calls, Officer Kelly responded to apprehend the threatening suspect and defuse what he believed to be a life or death situation of a fellow Durham police officer. In pursuit of the situation, there was some dispute as to what speed Officer Kelly was alleged to have been traveling. In a light most favorable to plaintiff, this speed varied between 55 and 74 miles per hour on a road where the speed limit was 35 miles per hour.

Jones I, 168 N.C. App. at 441, 608 S.E.2d at 393. Our Supreme Court eventually reversed on this issue in *Jones II*, adopting the dissenting opinion in *Jones I*. *Jones II*, 361 N.C. at 146, 638 S.E.2d at 203. The dissent in *Jones I*, adopted by *Jones II*, reasoned:

[T]he question is whether the evidence raises any genuine issue of material fact on the issue of gross negligence. Regarding gross negligence by a law enforcement officer, this Court has held:

An officer ‘must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury.’ ‘Gross negligence’ occurs when an officer consciously or **recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits.**

Viewed, as it must be, in the light most favorable to the plaintiff, the record evidence would allow a jury to find that: (1) Kelly was not pursuing an escaping felon, but was responding to Officer Fox’s call for assistance with a situation whose nature Kelly knew nothing about; (2) Kelly knew other officers had also responded to the call for backup, so that Officer Fox was not solely dependent on his aid; (3) Kelly was familiar with the street where the accident occurred, and knew it was a densely populated urban area; (4) as Kelly approached the accident site he was driving between 50 and 74 mph, and did

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not have his blue light and siren activated; (5) Kelly knew that the intersection of Liberty and Elizabeth Streets had been the site of several previous accidents, and that there were “people hanging out” there; (6) Kelly knew from previous experience that the safest maximum speed on the relevant stretch of Liberty Street was 45 mph; (7) Kelly did not apply his brakes when he saw plaintiff in his way; (8) Kelly lost control of his vehicle and struck plaintiff with such force that she suffered serious injuries; and (9) Kelly’s failure to drive at a safe speed for road conditions was a violation of the Basic Law Enforcement Training manual. I conclude that this evidence, if believed by the jury, tended to show a “high probability of injury to the public despite the absence of significant countervailing law enforcement benefits,” and thus raises a genuine issue of material fact on the question of gross negligence.

Jones I, 168 N.C. App. at 444, 608 S.E.2d at 394-95 (citations omitted).

Viewed in the light most favorable to Defendant, the record evidence in this case would allow a jury to find that: (1) Plaintiff was responding to a minor traffic accident involving only property damage, and the sole purpose of Plaintiff’s response was to provide traffic flow assistance; (2) Plaintiff, against department policy, initiated emergency response driving without any justifiable reason, and without notifying his department; (3) Plaintiff engaged his blue lights at some point, but failed to engage his siren, which was also a violation of department policy; (4) Plaintiff sped along Highway 117 at speeds topping one hundred mph where the posted speed limit was forty-five mph and possibly even thirty-five mph at certain points; (5) Plaintiff was a warrant officer and he did not usually engage in driving that required high speeds; (6) Plaintiff had no high-speed driving training beyond that obtained in his Basic Law Enforcement Training; (7) Plaintiff sped past a school, not knowing whether the school was in session; (8) Plaintiff also sped past an Interstate exit and a fire station before reaching Defendant’s residential neighborhood; (9) Plaintiff, because of his high speed, either did not see Defendant before she pulled out to cross the north-bound lane and head south on Highway 117, or saw Defendant and did not take appropriate measures to avoid a collision; (10) if Plaintiff did not see Defendant, it was either because he was traveling around a blind curve, or because he was not paying proper attention to the road ahead of him, perhaps suffering from tunnel vision due to his excessive speed; (11) Plaintiff was traveling ninety-five mph and still accelerating until immediately before he made contact with Defendant’s vehicle, when he finally removed

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his foot from the accelerator and apparently attempted to depress the brake; (12) this was the second automobile accident Plaintiff had been involved in in a single year; and (13) the accident would not have occurred had Plaintiff been engaged in “routine driving,” which was all that was warranted in this situation – in fact, the accident would probably not have occurred had Plaintiff simply been driving at a speed less than seventy-five miles per hour.

We find there was a “‘high probability of injury to the public despite the absence of significant countervailing law enforcement benefits[.]’” *Id.* We hold these facts are, at a minimum, as persuasive as the facts in *Jones* and, therefore, as our Supreme Court did in *Jones II*, we reverse the trial court’s grant of summary judgment in favor of Plaintiff and remand for further action on Defendant’s counter-claims against Plaintiff.

III.

[2] Defendant also argues the trial court erred, to the extent, if any, that it based its award of summary judgment to Plaintiff, Western Surety, Farm Bureau, and United Services on the defense of governmental immunity. We agree.

It does not appear that the trial court granted summary judgment in favor of Plaintiff based upon governmental immunity. It is clear that the Wayne County Sheriff’s Office had a \$25,000.00 bond, issued by Western Surety, that was in effect at the time of the 30 December 2009 accident. “According to N.C. Gen. Stat. § 58-76-5, a sheriff waives governmental immunity by purchasing a bond as is required by N.C. Gen. Stat. § 162-8.” *White v. Cochran*, __ N.C. App. __, __, 748 S.E.2d 334, 339 (2013). Therefore, summary judgment would have been improper on the basis of governmental immunity, at least as to potential damages up to the amount of the \$25,000.00 bond issued by Western Surety. *Id.*

Furthermore, this Court has recognized actions brought pursuant to N.C. Gen. Stat. § 20-145 as falling outside the general rule of governmental immunity. *Young v. Woodall*, 119 N.C. App. 132, 139-40, 458 S.E.2d 225, 230 (1995) (“*Young I*”), *rev’d*, 343 N.C. 459, 471 S.E.2d 357 (1996) (“*Young II*”), (together with *Young I*, “*Young*”). In *Young*, a Winston-Salem police officer, Officer Woodall, was sued, wherein the

plaintiff apparently argue[d] Officer Woodall failed to exercise reasonable care in the exercise of an alleged ministerial or proprietary function carried out for his own private purposes in contravention of departmental policy. Plaintiff also allege[d] that Officer Woodall failed to

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comply with the statutory standard of care codified in N.C. Gen. Stat. § 20-145.

Young I, 119 N.C. App. at 137, 458 S.E.2d at 228. The City of Winston-Salem had purchased liability insurance that would cover the alleged negligence of Officer Woodall, but only for any damages in excess of \$2,000,000.00. *Id.* at 136, 458 S.E.2d at 228. This Court held:

In summary, we conclude that the City of Winston-Salem and Officer Woodall, in his official capacity, are entitled to partial summary judgment based on governmental immunity for any damages up to and including two million dollars, except as to the contentions of negligence arising under N.C. Gen. Stat. § 20-145. We also conclude that Officer Woodall, in his individual capacity, is entitled to summary judgment, except as to the contentions of negligence arising under N.C. Gen. Stat. § 20-145. As to the contention that Officer Woodall failed to observe the standard of care provided in section 20-145, we affirm the trial court's denial of summary judgment on behalf of the City of Winston-Salem and Officer Woodall.

Id. at 139-40, 458 S.E.2d at 230. Stated another way, this Court held that governmental immunity did not apply to actions brought pursuant to N.C. Gen. Stat. § 20-145. Our Supreme Court granted discretionary review, and reversed in part, holding that the Court of Appeals had applied the wrong standard pursuant N.C. Gen. Stat. § 20-145, ordinary negligence, instead of the appropriate standard, gross negligence. *Young II*, 343 N.C. at 462, 471 S.E.2d at 359. Our Supreme Court reversed after applying the gross negligence standard and determining that the actions of Officer Woodall did not meet that standard. *Id.* at 463, 471 S.E.2d at 360.

Our Supreme Court did not overrule that part of the Court of Appeals' decision holding that governmental immunity did not apply to actions brought pursuant to N.C. Gen. Stat. § 20-145. In fact, though not specifically addressing this issue, our Supreme Court implicitly accepted this Court's holding that governmental immunity does not apply to actions brought pursuant to N.C. Gen. Stat. § 20-145. Bound by this precedent, we hold in the present case that Defendant's counterclaim based upon the alleged gross negligence of Plaintiff pursuant to N.C. Gen. Stat. § 20-145 is not barred by governmental immunity.

Reversed and remanded.

Judges HUNTER, Robert C. and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 AUGUST 2014)

ANDREWS v. PARRISH No. 13-1067	Wake (08CVD15341)	Affirmed
BROOKS v. MARTIN No. 13-1040	Harnett (13CVS25)	Affirmed
BROUSARD v. BROUSARD No. 14-301	Pitt (13CVS87)	Dismissed
CNTY. OF FORSYTH v. CANTERBURY No. 14-45	Forsyth (11CVD3167-68)	Reversed
GARREN v. WATTS No. 13-1085	Buncombe (11CVS6276)	Affirmed
IN RE B.A.S. No. 14-114	Henderson (12JT38)	Affirmed
IN RE BULLOCK No. 14-149	Granville (11SPC84)	Affirmed
IN RE D.M.W. No. 14-48	Forsyth (13J94)	Affirmed
IN RE K.B.G. No. 14-206	Mitchell (09J32)	Affirmed
IN RE K.C. No. 14-210	Edgecombe (12JA59-62)	Affirmed
IN RE KING No. 13-1314	Property Tax Commission (11PTC838)	Vacated and Remanded
IN RE L.E.S.W. No. 14-132	Davidson (11JT152) (12JT8)	Affirmed
IN RE T.M. No. 14-293	Durham (10J273)	Affirmed
LOVING v. WEBB No. 13-1082	Cumberland (12CVS7501)	Affirmed
MORGAN v. INTERIM HEALTHCARE No. 13-942	N.C. Industrial Commission (899078)	Affirmed

OKAFOR v. OKAFOR No. 13-1441	Guilford (12CVS10235)	Affirmed
ROBERTS v. ROBERTS No. 13-1210	Durham (09CVD307)	Affirmed
ROBERTS v. WARD No. 14-144	Madison (12CVD166)	Affirmed
STATE v. ADLAN No. 14-92	Guilford (12CRS94068)	No Error
STATE v. ALLEN No. 14-105	Henderson (12CRS513172) (12CRS53173) (13CRS50)	No Error
STATE v. AUTRY No. 14-218	Sampson (12CRS1594-95) (12CRS50683-84)	No Error
STATE v. BLOW No. 13-1238	Henderson (12CRS961)	No Error
STATE v. BROWN No. 14-35	Guilford (11CRS77219)	No Error
STATE v. BUNN No. 14-15	Durham (12CRS52074)	No prejudicial error
STATE v. CLOER No. 13-1423	Mecklenburg (10CRS237504)	Affirmed
STATE v. COFFIELD No. 14-19	Edgecombe (12CRS53619-20)	No Error
STATE v. DAVIS No. 13-1313	Forsyth (10CRS31069) (10CRS61853-54)	No Error
STATE v. DOBIE No. 13-1143	Mecklenburg (12CRS14674) (12CRS14676)	No Error
STATE v. DUNSTON No. 14-401	Durham (04CRS50087)	Affirmed
STATE v. EDWARDS No. 13-1290	Sampson (11CRS50400-02) (12CRS1596) (12CRS1599-1601)	No Error

STATE v. GRIFFIN No. 13-1213	Mecklenburg (12CRS200756)	No Error
STATE v. HAIZLIP No. 13-1286	Guilford (12CRS24422) (12CRS76539) (12CRS76540)	No Error
STATE v. HUGHES No. 14-73	Mecklenburg (12CRS200980-84)	No Error
STATE v. JOLLY No. 14-194	Guilford (12CRS24828) (12CRS92661)	No prejudicial error
STATE v. LOTT No. 13-719	Wake (11CRS218625-28) (11CRS218636-39) (11CRS218666)	No Error
STATE v. MATHES No. 13-955	Buncombe (12CRS61691)	No Prejudicial Error
STATE v. MOORE No. 14-141	Columbus (11CRS51346)	No Error
STATE v. MUTTER No. 13-1167	Buncombe (12CRS495) (12CRS53764-65) (12CRS54197)	No Error
STATE v. PERKINS No. 13-1352	Wake (09CRS211758-60) (09CRS211765)	No Error
STATE v. SELLERS No. 14-362	Davidson (11CRS53249) (12CRS758)	No Error
STATE v. SMITH No. 13-742-2	Cabarrus (09CRS7224)	Vacated and Remanded
STATE v. ST. GEORGE No. 14-180	Lenoir (13CRS50039) (13CRS700035)	No Error
STATE v. STYLES No. 14-281	McDowell (02CRS52509-11)	Vacated and Remanded
STATE v. SURRATT No. 13-1413	Cleveland (09CRS57002-03)	No Prejudicial error

STATE v. TAYLOR No. 14-21	Wake (11CRS214547)	No Error
STATE v. TUCKER No. 14-219	Forsyth (11CRS55247)	Reversed and Remanded
STATE v. WILLIAMS No. 13-1309	Burke (11CRS52730)	No Error
TOWNSEND v. SIMMONS No. 13-1320	Guilford (12SP555)	Affirmed
WELLS FARGO BANK, N.A. v. FISCHER No. 13-1273	Mecklenburg (12CVS12252)	Affirmed
WRIGHT v. ATL. ORTHOPEDICS, P.A. No. 14-136	New Hanover (11CVS4080)	Affirmed

4U HOMES & SALES, INC. v. McCOY

[235 N.C. App. 427 (2014)]

4U HOMES & SALES, INC., PLAINTIFF

v.

HELEN EVETTE McCOY, DEFENDANT

No. COA13-1450

Filed 5 August 2014

Jurisdiction—standing—aggrieved party—appeal from small claims judgment

The trial court lacked jurisdiction over an appeal from a magistrate's judgment in a small claims action for breach of the implied warranty of habitability. Defendant was not an aggrieved party and thus had no standing to appeal the magistrate's judgment where defendant pled damages in excess of the amount available in a small claims action and then obtained all of the relief that defendant was able to obtain in the small claims court.

Appeal by plaintiff and defendant from order entered 13 August 2013 by Judge Ty Hands in Mecklenburg County District Court. Heard in the Court of Appeals 23 April 2014.

Leslie C. Rawls for Plaintiff.

Legal Aid of North Carolina, Inc., by Chadwick H. Crockford & Isaac W. Sturgill, and Legal Services of Southern Piedmont, by Edward P. Byron, for Defendant.

ERVIN, Judge.

Plaintiff 4U Homes & Sales, Inc., and Defendant Helen Evette McCoy appeal from a judgment entered by the trial court rejecting Plaintiff's request that Defendant be summarily ejected from a rental house owned by Plaintiff, awarding Defendant \$3,705.00 in compensatory damages for breach of the implied warranty of habitability, and finding in Plaintiff's favor with respect to the unfair and deceptive trade practice and unfair debt collection practice claims that Defendant had asserted against Plaintiff. On appeal, Plaintiff contends that (1) the trial court's determination that Plaintiff had breached the implied warranty of habitability lacked adequate evidentiary support, (2) the trial court erred by determining that the fair rental value of the home as warranted was \$495.00 per month, and (3) the trial court erred by failing to account for outstanding rent in calculating the amount of damages to be awarded to Plaintiff.

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Defendant, on the other hand, contends that the trial court erred by determining that Defendant had not established that she was entitled to relief on the grounds that Plaintiff had engaged in unfair and deceptive trade and unfair debt collection practices. After careful consideration of the parties' challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court lacked jurisdiction to hear Defendant's appeal from the magistrate's judgment, that the trial court's order must be vacated for lack of jurisdiction, and that this case must be remanded to the Mecklenburg County District Court for further remand to the magistrate for reinstatement of the magistrate's original judgment.

I. Factual BackgroundA. Substantive Facts1. Plaintiff's Evidence

Cynthia Exum and her husband, Larry Exum, created Plaintiff in 1994 for the purpose of selling and leasing real property. At any given point in time, Plaintiff held from ten to twelve tracts of rental property.

Defendant lived across the street from a property located on Reliance Street, which Plaintiff had acquired in 2010. Although Defendant made inquiry of the Exums about renting the property, they initially declined to enter into such an arrangement with Defendant because they were not ready to rent the property. More specifically, the Exums wanted to have certain cosmetic work done prior to renting the property in order to get a higher monthly rent.

After asking about the property for a year, Defendant told the Exums that she needed to rent the property given that she was about to become homeless due to a pending eviction. As a favor to Defendant, the Exums agreed to rent the property. Once Defendant indicated that she could only afford to pay \$350.00 per month in rent, the Exums accepted Defendant's offer given that, in their opinion, the property was in good condition and the amount of rent that Defendant proposed appropriately reflected the property's value. For that reason, the Exums told Defendant that she could rent the property in its current condition for \$350.00 or rent it for \$650.00 after all repairs had been completed.¹

1. Although the Exums believed that the \$350.00 amount reflected the current value of the property, Ms. Exum asserted that, if the home had simply been repainted and the carpet replaced, the home's rental value would have been \$50.00 per month higher.

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After considering Plaintiff's offer, Defendant entered into a lease agreement with Plaintiff under which she agreed to rent the property for \$350.00 per month from 6 July 2011 until 31 July 2012. In addition, consistently with Plaintiff's routine practice, the lease agreement between Plaintiff and Defendant provided for the payment of a \$25.00 late fee. A comparison of the property in question with five other nearby properties on a per square foot basis indicated that the amount of rent that Plaintiff charged Defendant was comparable to that charged for other properties in the area.

The Exums conducted a walkthrough with Defendant prior to allowing her to occupy the property. During that process, Defendant failed to find anything that would tend to render the property unfit for human habitation. A ruptured pipe found on the premises was repaired before Defendant moved in. Although one of the windows was cracked, a replacement window was ordered and installed after Defendant occupied the property. Although Defendant acknowledged that the home was "fit," she also indicated that it needed to be "fixed."

Any repair requests that Defendant made during the time that she occupied the property were honored. For example, when Defendant made Mr. Exum aware in September 2011 that the hot water heater needed repair, he ordered another one on the same day. In the course of fixing the water heater, Mr. Exum noticed that someone had removed the fuse box cover and he made the necessary repairs. In March 2012, Defendant reported a loose toilet to Mr. Exum. After he removed the toilet, Mr. Exum noticed that the subfloor did not suffice to support the toilet, so he replaced and reattached the subfloor and related vinyl tile. In addition, the Exums repaired a broken storm door on the same date. All of these repairs were completed within a few days of notification.

Defendant was behind on her rent payments during the entire lease period. Although the Exums allowed her to make partial payments, Defendant never paid her rent on time. Plaintiff collected a \$25.00 late fee from Defendant in February 2012. The Exums declined to renew Defendant's lease at the end of the initial rental period and informed Plaintiff "from time to time" that she would eventually need to move out.

In September 2012, Plaintiff initiated a summary ejectment action against Defendant based upon her failure to make required rental payments. Although Plaintiff obtained a judgment against Defendant, the Exums, instead of taking possession of the property, informed Defendant that she would be evicted if she failed to keep her rent payments current.

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Subsequently, Plaintiff forgave four late fees that they were entitled to assess against Defendant under the terms of the lease agreement. However, Defendant failed to pay her rent for the following month in a timely manner.

In January of 2013, Defendant asked Mr. Exum to repair the heater. Two weeks later, the heater broke again. Although the Exums informed Defendant that they could come that Saturday to make the needed repairs, Defendant never returned their phone call. As a result, Mr. Exum went by the home on the following Monday to speak with Defendant and identify a time when he could repair the heater. However, Defendant replied that she would not be home until Thursday and refused to allow Mr. Exum to enter the premises in her absence.

On Thursday, 7 February 2013, the building code inspector inspected the home. After the inspection had been completed, Defendant gave Mr. Exum permission to fix the heater, a process which Mr. Exum completed in thirty minutes. The Exums also spoke with the inspector after the inspection had been completed. On the same date, Plaintiff notified Defendant that her month-to-month tenancy would be terminated and she would have to vacate the property within 45 days. The Exums sent the termination notice because of their belief that Defendant had purposely blocked the making of the needed heater repair and their conviction, in light of their experiences with Defendant, that a continuing landlord-tenant relationship with her would not be successful. According to the Exums, Defendant owes \$1,196.93 in past due rent.

A week later, the Exums received an inspection report that contained a list of code violations, with the unrepaired heater being listed as the most critical violation. Although the report asserted that there were no smoke detectors in the home, such devices had been installed before Defendant occupied the residence. Even so, Mr. Exum installed new smoke detectors at the time that he repaired the heater. After receiving the inspection report, the Exums called Defendant to schedule the making of the necessary repairs. However, Defendant did not answer their calls. In spite of the fact that the parties' lease agreement allowed the Exums to enter the premises in order to make repairs, Defendant refused to allow Mr. Exum to enter the home or to take photographs of it. Instead, Defendant slammed the door on Mr. Exum's foot and called her attorney.

In April and May, Plaintiff communicated with Defendant's attorney in an attempt to obtain permission to enter the residence in order to make needed repairs. After Defendant obtained a new attorney in June,

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the Exums received authorization to enter the residence and replaced the ceiling, which was sagging, and the windowsills, which were decaying.

2. Defendant's Evidence

Defendant moved into the rental property in July 2011 and made her last rent payment in March 2013. At the time of the initial walkthrough, the home was dirty and smelled of animal urine and feces. In addition, the shower was dripping, the toilet was loose and unstable, and there appeared to be a hole in the floor in the vicinity of the toilet. Defendant requested that all of these conditions be repaired. Finally, Defendant informed the Exums that the ceiling appeared to be about to cave in; however, the ceiling was not repaired until after the February 2013 inspection. Although Defendant informed the Exums that there were no smoke or carbon monoxide detectors in the home immediately after occupying the premises, this deficiency was not rectified until after the February 2013 inspection as well. In spite of these problems, Defendant agreed to rent the property for a monthly amount of \$350.00.

Defendant called the inspector in February of 2013. The only violation identified by the inspector of which Defendant had not been previously aware was the fact that the breaker box did not comply with the applicable building code. On the evening following the inspection, Mr. Exum called Defendant to ask what violations had been identified. Although Mr. Exum stated that he had already known what the inspector's findings would be, he indicated that the owner² would not pay for the needed repairs given that the monthly rent was only \$350.00.

According to Defendant, a monthly rental payment of \$350.00 did not reflect the fair market value of the home given the number of code violations that existed at the beginning of her tenancy. Had Defendant been aware of all of the code violations identified by the inspector, she would have only agreed to a \$300.00 monthly rental payment. Although Defendant was charged a \$25.00 late fee on multiple occasions and although the Exums claimed to have only collected one late fee, Plaintiff's ledger indicated that a late fee of \$17.50 had been collected on six occasions. The first portion of any payment that Defendant made was applied to rent, with the remainder being attributed to any outstanding late fee amounts. In view of the fact that Defendant consistently failed to pay her rent on time, the late fee amounts that she was assessed were never actually collected.

2. According to Defendant, the Exums consistently maintained that they did not own the property.

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B. Procedural History

On 18 March 2013, Plaintiff filed a complaint seeking to have Defendant summarily ejected from the property on the grounds that she had held over after the expiration of her tenancy and the recovery of \$750.00 in past due rent. On 1 April 2013, Defendant filed an answer in which she denied the material allegations of the complaint and asserted counterclaims for breach of the implied warranty of habitability, charging illegal rent, charging illegal fees, and engaging in unfair debt collection and unfair and deceptive trade practices. On 26 April 2013, the magistrate entered a judgment finding that Plaintiff's summary ejectment claim should be dismissed with prejudice, that Defendant had proven all of the counterclaims alleged in her responsive pleading, and that Defendant was entitled to recover a rent abatement in the amount of \$5,000.00, which was the maximum that the magistrate could allow by law, and attorney's fees from Plaintiff.

On 1 May 2013, Defendant noted an appeal to the District Court from the magistrate's judgment. On 14 June 2013, Plaintiff filed a reply to the Defendant's counterclaims. The case came on for hearing before the trial court, sitting without a jury, at the 15 July 2013 civil session of the Mecklenburg County District Court. On 13 August 2013, the trial court entered a judgment dismissing Plaintiff's claim for summary ejectment, finding in Plaintiff's favor with respect to Defendant's counterclaims for unfair debt collection and unfair and deceptive trade practices, and awarding Defendant \$3,705.00 in compensatory damages for Plaintiff's breach of the implied warranty of habitability. Both parties noted appeals to this Court from the trial court's judgment.

II. Legal Analysis

In its briefs, Plaintiff argues that the trial court erred by finding that Plaintiff breached the implied warranty of habitability, overruling Plaintiff's objection to Defendant's testimony concerning the value of the leased premises as of the date upon which her occupancy began, improperly calculating the amount of damages that should be awarded to Defendant, and failing to find that Plaintiff's summary ejectment claim had been rendered moot by Defendant's surrender of the premises while Defendant contends that the trial court erred by refusing to determine that Plaintiff had engaged in unfair and deceptive trade and unfair debt collection practices. As an initial matter, however, we must determine whether the trial court had the authority to enter the order from which both parties have appealed.

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“A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.” *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). Put another way, “[s]ubject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act.” *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). In addition, “subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court’s subject matter jurisdiction on its own motion or *ex mero motu*.” *Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009). Although filing an action in the District Court Division that should be brought in the Superior Court Division or vice versa does not ordinarily deprive the court in which the action is filed of subject matter jurisdiction in the absence of the existence of a statutory provision giving one or the other of these two components of the General Court of Justice exclusive jurisdiction over a particular type of claim, *see* N.C. Gen. Stat. § 7A-257 (stating that the “[f]ailure of a party to move for transfer within the time prescribed is a waiver of any objection to the division”; *Peoples v. Peoples*, 8 N.C. App. 136, 143, 174 S.E.2d 2, 7 (1970) (stating that “no order of the district court may be overturned merely because it was not the proper division to enter the order”), the same is not true of actions filed in the small claims court.

At the time that this case was pending in the trial courts, a small claim action was defined as a civil action where:

- (1) The amount in controversy, computed in accordance with [N.C. Gen. Stat. §] 7A-243, does not exceed five thousand dollars (\$5,000); and
- (2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; and
- (3) The plaintiff has requested assignment to a magistrate in the manner provided in this Article.

N.C. Gen. Stat. § 7A-210 (2011).³ However, N.C. Gen. Stat. §7A-219 provides that:

3. The General Assembly increased the jurisdictional limitation applicable to small claims actions to \$10,000 for all actions filed on or after 1 August 2013. 2013 N.C. Sess. L. c. 159 s. 1 & 6.

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[n]o counterclaim, cross claim or third-party claim which would make the amount in controversy exceed the jurisdictional amount established by [N.C. Gen. Stat. §] 7A-210(1) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action. Notwithstanding [N.C. Gen. Stat. §] 1A-1, Rule 13, failure by a defendant to file a counterclaim in a small claims action assigned to a magistrate, or failure by a defendant to appeal a judgment in a small claims action to district court, shall not bar such claims in a separate action.

Unlike N.C. Gen. Stat. § 7A-243, which establishes the amount in controversy necessary to make an action “proper” in either the District or Superior Court divisions, N.C. Gen. Stat. § 7A-219 absolutely bars the consideration of claims that exceed the “jurisdictional amount” in small claims court, rendering the amount in controversy applicable to actions assigned to the magistrate jurisdictional in nature. *See also Fickley v. Greystone Enters.*, 140 N.C. App. 258, 261, 536 S.E.2d 331, 333 (2000) (noting that the “plaintiffs [sought] damages in excess of \$10,000, which exceeds the \$3,000 jurisdictional amount in small claim actions pursuant to the provisions of N.C. Gen. Stat. § 7A-210(1)” in effect at that time).

The proper treatment of cases filed in the small claims court in which counterclaims, some of which may be compulsory, seeking damages in excess of the jurisdictional amount are asserted, has been a source of legislative concern as well. In order to address this issue, the General Assembly gave litigants two options. First, N.C. Gen. Stat. § 7A-220 provides that “the judge shall allow appropriate counterclaims” “[o]n appeal from the judgment of the magistrate for trial de novo before a district judge.”⁴ Secondly, N.C. Gen. Stat. § 7A-219 provides that,

4. We suggested this approach in *Fickley*, in which the defendant had filed two successful summary ejectment proceedings against the plaintiffs. *Fickley*, 140 N.C. App. at 259, 536 S.E.2d at 332. Instead of appealing the magistrate’s decision in the summary ejectment actions, the plaintiffs instituted a separate action seeking damages for retaliatory eviction and unfair trade practices in the Superior Court. *Id.* In the Superior Court action, the defendant successfully asserted that the plaintiffs’ claims constituted compulsory counterclaims that were barred because they had not been asserted before the magistrate. *Id.* at 259-60, 536 S.E.2d at 333. After agreeing that the plaintiffs’ claims constituted compulsory counterclaims, *id.* at 260-61, 536 S.E.2d at 333, we noted that they could not

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“[n]otwithstanding [N.C. Gen. Stat. §] 1A-1, Rule 13, failure by a defendant to file a counterclaim in a small claims action assigned to a magistrate, or failure by a defendant to appeal a judgment in a small claims action to district court, shall not bar such claims in a separate action.”⁵ As a result, a defendant in a summary ejection action who wishes to assert counterclaims that have a value greater than the jurisdictional amount applicable in small claims court⁶ may either assert their claims on appeal to the District Court from an adverse decision by the magistrate or assert those claims in an entirely separate action.⁷ However,

have been properly asserted before the magistrate because the amount in controversy exceeded the jurisdictional limit applicable in small claims court actions. *Id.* at 261, 536 S.E.2d at 333-34. As a result of the compulsory nature of the plaintiffs’ claims and the fact that they could have been litigated in an appeal from the magistrate’s decision, we determined that the plaintiffs’ claims were barred and affirmed the trial court’s order. *Id.* at 261-62, 536 S.E.2d at 333-34; *see also Cloer v. Smith*, 132 N.C. App. 569, 575, 512 S.E.2d 779, 782 (1999) (holding that the correct course of action for a defendant who wishes to assert a counterclaim that exceeds the jurisdictional limit applicable to matters heard in the small claims court was to “file [the] action, if at all, with her appeal from the magistrate’s decision to the district court”).

5. Although we need not address the validity of this approach given that it was not used in this instance, another possible resolution of the problem discussed in the text of this opinion might be a request that the entire case be transferred from the small claims court to the District Court. N.C. Gen. Stat. § 7A-257 (stating that “[a]ny party may move for transfer between the trial divisions”); *see also Stanback v. Stanback*, 287 N.C. 448, 457, 215 S.E.2d 30, 37 (1975) (providing that, “[a]lthough the case allocations of Chapter 7A are [mostly] administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation”).

6. According to N.C. Gen. Stat. § 7A-210(1), the amount in controversy in small claims actions is computed in accordance with N.C. Gen. Stat. § 7A-243. According to N.C. Gen. Stat. § 7A-243(2), “[w]here monetary relief is prayed, the amount prayed for is in controversy unless the pleading in question shows to a legal certainty that the amount claimed cannot be recovered under the applicable measure of damages.” As a result of the fact that Defendant alleged in her counterclaims that she was entitled to receive a \$4,000.00 penalty for each of Plaintiff’s violations of the Fair Debt Collection Practices Act pursuant to N.C. Gen. Stat. § 75-55 and claims that “numerous” such violations occurred, it is clear from that portion of Defendant’s counterclaims, without considering her additional claims for breach of the implied warranty of habitability, retaliatory eviction, the charging of illegal rents and fees, and unfair and deceptive trade practices, that the value of Defendant’s counterclaims exceeded the applicable jurisdictional amount. *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 310, 677 S.E.2d 1, 10 (2009) (using a similar process to calculate the value of certain claims that a plaintiff attempted to assert in small claims court), *disc. review denied*, 363 N.C. 800, 690 S.E.2d 530, (2010). The validity of this conclusion is reinforced by the fact that the magistrate found that he or she could not award Defendant the full value of the claims that she presented at the summary ejection hearing.

7. In *Holloway v. Holloway*, __, N.C. App. __, __, 726 S.E.2d 198, 200 (2012), the defendant filed an unsuccessful summary ejection action against the plaintiff. Although the defendant appealed from the judgment in the small claims court to the District Court, the jury returned a verdict in favor of the plaintiff on appeal as well. *Id.* In a subsequent

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neither of these options was applicable in this case since Plaintiff did not appeal from the magistrate's adverse decision against it, and Defendant, instead, elected to assert counterclaims that the magistrate found exceeded applicable jurisdictional limits in the small claims court and then attempted to appeal the magistrate's judgment to the District Court despite the fact that the magistrate found in her favor and awarded her everything that he could have possibly awarded her.

"After final disposition before the magistrate, the sole remedy for an aggrieved party [to a small claims action] is appeal for trial de novo before a district court judge or a jury." N.C. Gen. Stat. § 7A-228(a). As a result, the only party entitled to invoke the District Court's jurisdiction following a decision by the magistrate in small claims court is an "aggrieved party." Although neither this Court nor the Supreme Court has addressed the issue of what constitutes an "aggrieved party" for purposes of N.C. Gen. Stat. § 7A-228(a), the Supreme Court has defined a "person aggrieved" in the appellate context as a person "adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." *In re Halifax Paper Co.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963) (quoting 3 C.J.S. *Aggrieved* § 333 (1936)). As a result of the fact that Defendant submitted her counterclaims for the magistrate's consideration in small claims court and received the maximum amount of relief available in that forum, we are unable to see how any of her legal rights were adversely affected. Admittedly, as Defendant notes, "a party who prevails at trial may appeal from a judgment that is only partly in its favor or is less favorable than the party thinks it should be." *Casado v. Melas Corp.*, 69 N.C. App. 630, 635, 318 S.E.2d 247, 250 (1984) (citing *New Hanover Cnty. v. Burton*, 65 N.C. App. 544, 547, 310 S.E.2d 72 74 (1983), and *McCulloch v. N.C. R.R. Co.*, 146 N.C. 316, 320, 59 S.E. 882, 884 (1907)). However, this principal applies in situations in which the court had the authority to grant the additional relief that the plaintiff sought to obtain rather than in situations in which the plaintiff requested the court to grant more relief than the court had power to award. In addition, Defendant argues that Plaintiff's challenge to the

damage action that the plaintiff filed against the defendant, the defendant claimed that the claims the plaintiff sought to assert should have been brought before the District Court on the theory that they were compulsory counterclaims. *Id.* at ___, 726 S.E.2d at 200-01. After noting the tension between the relevant statutory provisions in cases that involved compulsory counterclaims that were actually appealed from the small claims court to the District Court, *id.* at ___, 726 S.E.2d at 201-02, we held that, since the claims that the plaintiff sought to assert in the separate action had not been ripe at the time that the magistrate's judgment was appealed to the District Court, they were not required to be asserted before the District Court at that time. *Id.* at ___, 726 S.E.2d at 202.

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trial court's jurisdiction over this case ignores the fact that a tenant is required to assert the breach of the implied warranty of habitability as a defense in the summary ejectment action. Patrick K. Hetrick & James B. McLaughlin, *Webster's Real Estate Law in North Carolina* § 6.04[3] (6th ed. 2012) (stating that a "tenant who is in default in making rent payments can raise the landlords' breach of the statutory warranty of habitability by way of recoupment, counterclaim, defense, or setoff"). However, Defendant's argument overlooks the fact that the use of a breach of the warranty of habitability as a defense in a summary ejectment action does not preclude the assertion of that breach as a counterclaim on appeal to the District Court for a trial *de novo* in the event that the landlord prevails before the magistrate or in a separate action. As a result, neither of Defendant's attempts to explain why a party who pleads damages in excess of the amount available in a small claims action and then obtains all of the relief that he or she is able to obtain in the small claims court is an "aggrieved party" with standing to seek additional relief on appeal to the District Court.

As a result, the record clearly reflects that Defendant had no standing to appeal the magistrate's judgment in small claims court. In view of that fact, we have no choice except to conclude that the District Court had no authority to hear and decide this case, a determination that renders the District Court's judgment void, requires us to vacate the District Court's judgment, *e.g.*, *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (holding that "[a] judgment is void, when there is a want of jurisdiction by the court over the subject matter of the action"), and necessitates a conclusion that the judgment entered by the magistrate was never properly challenged. As a result, the trial court's judgment must be vacated and this case remanded to the District Court for further remand to the small claims court for the reinstatement of the magistrate's judgment.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court lacked jurisdiction over this case. As a result, the trial court's order should be, and hereby is, vacated and this case should be, and hereby is, remanded to the Mecklenburg County District Court for further remand to the magistrate with instructions that the original magistrate's judgment be reinstated.

VACATED and REMANDED.

Judges GEER and STEPHENS concur.

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[235 N.C. App. 438 (2014)]

BEVERAGE SYSTEMS OF THE CAROLINAS, LLC, PLAINTIFF
v.
ASSOCIATED BEVERAGE REPAIR, LLC, LUDINE DOTOLI AND
CHERYL DOTOLI, DEFENDANTS

No. COA14-185

Filed 5 August 2014

1. Contracts—breach of contract—non-compete agreement—trial court’s authority to revise the agreement

The trial court erred in a case involving a non-compete agreement by granting summary judgment against plaintiff on its breach of contract claim. Pursuant to the terms of the agreement, the trial court had express authority to revise the territorial restrictions in the agreement. The matter was remanded for the trial court to revise the geographic territories to include those areas reasonably necessary to protect plaintiff’s business interests. Furthermore, there was a genuine issue of material fact as to whether defendant violated the terms of the agreement.

2. Wrongful Interference—tortious interference with contract—implied-in-fact contract—sufficient forecast of evidence

The trial court erred by granting summary judgment in favor of defendant as to its claim for tortious interference with a contract. Plaintiff forecasted evidence for each element of tortious interference with a contract, including that it had implied-in-fact contracts with third parties based on past business dealings, and there was a material issue of fact as to whether defendants interfered with those contracts.

3. Wrongful Interference—tortious interference with prospective economic advantage—genuine issue of material fact

The trial court erred by granting defendants’ summary judgment motion on their claim for tortious interference with a prospective economic advantage. There was a genuine issue of fact whether customers refrained from entering into contracts or continuing previous implied contracts with plaintiff but for defendants’ unjustified interference.

4. Unfair Trade Practices—violation of non-compete agreement—material issue of fact

The trial court erred in granting summary judgment in favor of defendant on plaintiff’s claim for unfair and deceptive practices or

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acts. Since there was a material issue of fact whether defendants solicited business away from plaintiff in violation of a non-compete agreement, plaintiff's allegations also maintained an unfair and deceptive practices claim. Furthermore, plaintiff forecasted sufficient evidence that defendant's breach of the non-compete was deceptive and was sufficient to maintain an unfair and deceptive practices claim.

5. Injunctions—likelihood of success—breach of contract

The trial court erred by granting summary judgment on plaintiff's claim for injunctive relief. Because the Court of Appeals reversed and remanded the trial court's order granting summary judgment in favor of defendant on plaintiff's breach of contract claim, the trial court was required to determine whether there was a likelihood of success on the merits of plaintiff's breach of contract claim based on the revised non-compete.

ELMORE, Judge., dissenting.

Appeal by plaintiff from order entered 3 October 2013 by Judge A. Robinson Hassell in Iredell County Superior Court. Heard in the Court of Appeals 20 May 2014.

Jones, Childers, McLurkin & Donaldson, PLLC, by Kevin C. Donaldson and Dennis W. Dorsey, for plaintiff-appellant.

Eisele, Ashburn, Greene & Chapman, PA, by Douglas G. Eisele, for defendants-appellees.

HUNTER, Robert C., Judge.

Plaintiff timely appeals from an order entered 3 October 2013 granting defendants' motion for summary judgment. After careful review, because the trial court had express authority to revise the restrictions of the non-compete agreement, we reverse the trial court's order and remand for the trial court to revise the geographic area covered by the non-compete to include those areas necessary to reasonably protect plaintiff's business interests. Furthermore, since there is a genuine issue of material fact as to whether Ludine Dotoli violated the revised non-compete, we reverse the order granting summary judgment on the breach of contract claim and remand for trial. Finally, because plaintiff presented evidence showing a genuine issue of material fact for the

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remaining tort claims and request for injunctive relief, we reverse the order granting defendants' motion for summary judgment and remand for trial.

Background

The pertinent facts alleged in plaintiff's complaint are as follows: In 2009, Mark Gandino ("Gandino") created and organized Beverage Systems of the Carolinas, LLC, a company that supplies, installs, and services beverage products and beverage dispensing equipment in North Carolina ("plaintiff"). Beginning in 2008 and continuing through 2009, Gandino negotiated with Thomas and Kathleen Dotoli, the parents of defendant Ludine Dotoli ("Ludine")¹ (collectively, Thomas, Kathleen, and Ludine are referred to as "the Dotolis"), about the potential purchase of the business and assets of Imperial Unlimited Services, Inc. ("Imperial") and Elegant Beverage Products, LLC ("Elegant") (collectively, Imperial and Elegant are referred to as "the businesses"). On or about 20 July 2009, plaintiff entered into an "Asset Purchase Agreement" (the "Agreement") with Elegant, Imperial, and the Dotolis. The Agreement provided for the sale of Imperial's and Elegant's assets, trade names, customer lists, accounts receivable, current customers and customer contracts, all equipment, and real property.

As part of the Agreement, Thomas, Kathleen, and Ludine agreed to execute a "Non-Competition Agreement" (the "non-compete"). Specifically, section 1 of the non-compete provided that:

Subject to the provisions of Section 6 hereof, Seller and Shareholder shall not, from the effective date of the Asset Agreement in the states of North Carolina or South Carolina until the earlier of (i) October 1, 2014 (the "Non-Competition Period"), or (ii) such other period of time as may be the maximum permissible period of enforceability of this covenant (the "Termination Date"), without the prior written, consent of Purchaser, directly or indirectly, for himself or on behalf of or in conjunction with any person, partnership, corporation or other entity, compete, own, operate, control, or participate or engage in the ownership, management, operation or control of, or be connected with as an officer, employee, partner, director,

1. Throughout their pleadings and brief, plaintiff and defendants refer to Mr. Dotoli as "Ludine" even though it appears from his affidavit that his name is spelled "Loudine." For consistency, we use the same spelling as the parties in this opinion.

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shareholder, representative, consultant, independent contractor, guarantor, advisor or in any other manner or otherwise, directly or indirectly, have a financial interest in, a proprietorship, partnership, joint venture, association, firm, corporation or other business organization or enterprise that is engaged in the business of the Purchaser or any of its respective affiliates or subsidiaries on behalf of clients (the “Business”).

The non-compete went on to say that:

If, at the time of enforcement of any provisions of Sections 1, 3 or 4 hereof, a court holds that the restrictions stated herein are unreasonable under circumstances then existing, the parties hereto agree that the maximum period, scope or geographical area that are reasonable under such circumstances shall be substituted for the stated period, scope or area, and that the court shall be allowed to revise the restrictions contained in Sections 1, 3 and 4 hereof to cover the maximum period, scope and area permitted by law.

The Dotolis executed the non-compete at the closing on 30 September 2009. Plaintiff claimed that it collectively paid the Dotolis, Imperial, and Elegant \$10,000 as consideration for the non-compete.

In March 2011, plaintiff learned that Ludine’s wife Cheryl Dotoli (“Cheryl”) had created defendant Associated Beverage Repair, LLC, (“Associated Beverage”) (for purposes of this opinion, Associated Beverage, Ludine, and Cheryl are collectively referred to as “defendants”) and that Ludine was the manager of Associated Beverage. Moreover, plaintiff alleged that it found out that Ludine was soliciting business from plaintiff’s existing customers, specifically PF Chang’s and Bunn-O-Matic.

On 8 July 2013, plaintiff filed an amended complaint alleging the following causes of action: (1) breach of the non-compete against Ludine; (2) a request for preliminary and permanent injunctive relief against Ludine; (3) tortious interference with contract against all defendants; (4) unfair and deceptive practices against all defendants; (5) tortious interference with prospective economic advantage against all defendants; and (6) punitive damages. On 11 September 2013, defendants filed a motion for summary judgment as to all causes of action. In support of their motion, defendants filed an affidavit by Ludine claiming that “the deepest penetration by either Elegant or Imperial for the conduct of their

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business into South Carolina was Rock Hill . . . and to Spartanburg,” and the “western-most penetration” included Gaffney. Furthermore, Ludine averred that in North Carolina, the furthest west the companies’ business went was Morganton. The eastern-most penetration was to Wake County. Finally, Ludine denied contacting, communicating, or in any way inducing any prior customers of Imperial or Elegance or present customers of plaintiff into switching their business to Associated Beverage.

The matter came on for hearing on 30 September 2013. On 3 October 2013, the trial court entered an order granting defendants’ motion for summary judgment as to all claims. Plaintiff timely appealed.

Standard of Review

“Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 573 (2008) (internal citations omitted).

Arguments**I. The Non-Compete Agreement**

[1] Plaintiff first argues that the trial court erred in granting summary judgment on its breach of contract claim against Ludine. Specifically, plaintiff contends that the non-compete is valid as a matter of law and that there is an issue of material fact as to whether Ludine violated it. In the alternative, should the Court determine that the non-compete is unenforceable as to South Carolina, plaintiff argues that the non-compete may still be enforced in North Carolina based on the “blue pencil doctrine.” Because the trial court had express authority to revise the territorial restrictions of the non-compete pursuant to the terms of the agreement, we reverse the trial court’s order granting summary judgment and remand this issue for the trial court to revise the geographic territories to include those areas reasonably necessary to protect plaintiff’s business interests acquired by the purchase of Elegant and Imperial. Furthermore, there is a genuine issue of material fact as to whether Ludine violated the terms of the non-compete for the jury to resolve.

It is the rule today that when one sells a trade or business and, as an incident of the sale, covenants not to engage in the same business in competition with the purchaser, the covenant is valid and enforceable (1) if it is reasonably necessary to protect the legitimate interest of

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the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest of the public.

Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 662-63, 158 S.E.2d 840, 843 (1968). Whether a covenant not to compete is reasonable is a matter of law to be decided by the court. *Id.* at 663, 158 S.E.2d at 843. “Greater latitude is generally allowed in these covenants given by the seller in connection with the sale of a business than in covenants ancillary to an employment contract.” *Seaboard Indus., Inc. v. Blair*, 10 N.C. App. 323, 333, 178 S.E.2d 781, 787 (1971). Here, only the first two elements need to be addressed since defendants did not argue before the trial court nor on appeal that the non-compete interfered with the interest of the public.

A. Legitimate Interest

“A covenant must be no wider in scope than is necessary to protect the business of the employer.” *Hartman v. W.H. Odell & Associates, Inc.*, 117 N.C. App. 307, 316, 450 S.E.2d 912, 919 (1994) (internal quotation marks omitted).

Here, the scope of prohibited employment activities in the non-compete is reasonably necessary to protect plaintiff’s business. In his affidavit, Ludine stated that he had not only been the creator and owner of Elegant, but he had also been the “principal technician” of Imperial. Thus, his employment activities for the businesses would have included both employee ones and activities related to management, operation, and control. The non-compete prohibits Ludine from competing, owning, managing, operating or controlling, or be connected to someone who has a financial interest in any business involved in the beverage dispensing or servicing industry. Thus, the non-compete prohibits Ludine from engaging in employment activities he used to perform for Elegant and Imperial, and the scope of the non-compete reasonably protects a legitimate business interest of plaintiff.

B. Time and Territory Reasonableness

The non-compete restricted Ludine’s activities for a five-year period following the sale of Elegant and Imperial. Although our Court has stated that “[a] five-year time restriction is the outer boundary which our courts have considered reasonable” and has noted that five-year restrictions “are not favored” in employment contracts, *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 280, 530 S.E.2d 878, 881 (2000), “[i]n cases where the covenants not to compete accompanied the sale

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of a trade or business, time limitations of ten, fifteen and twenty years, as well as limitations for the life of one of the parties, have been upheld by the Supreme Court of North Carolina[.]" *Seaboard Indus.*, 10 N.C. App. at 335, 178 S.E.2d at 788. Furthermore, the five-year restriction was reasonable based on Imperial's past business presence in the industry. Imperial had been operating since 1999. In fact, plaintiff recognized how valuable Imperial's presence was in the beverage dispensing industry and specifically purchased its "goodwill" for \$100,000. Accordingly, the time restraint was reasonable.

With regard to the reasonableness of the territory, this Court has noted that

to prove that a geographic restriction in a covenant not to compete is reasonable, an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships. A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in *maintaining* its customers. The employer must show that the territory embraced by the covenant is no greater than necessary to secure the protection of its business or good will.

Hartman, 117 N.C. App. at 312, 450 S.E.2d at 917 (internal citations omitted).

Here, the non-compete was limited to North and South Carolina. Ludine's affidavit stated that Imperial's and Elegant's combined business extended from Wake County to Morganton in North Carolina. In South Carolina, Ludine averred that their business only reached as deep as Rock Hill and Spartanburg and as far west as Gaffney. Consequently, the geographic area covered by the non-compete was not limited to places where Elegant and Imperial had former customers and included areas not necessary to maintain plaintiff's customer relationships; thus, it was unreasonable.² Plaintiff requests that should the Court find that

2. It should be noted that any area in which plaintiff itself had former or existing customers would also be reasonable to include in the non-compete. However, defendants contended in their motion for summary judgment that "[t]here is no pleading or proof that [plaintiff] operated anywhere in North Carolina or South Carolina prior to concluding purchase of the assets of Imperial and Elegant[.]" Plaintiff did not refute this nor did it provide any evidence in the record that it either had been operating in North or South Carolina prior to the acquisition or that it has existing customers it did not acquire from Imperial or Elegant. Therefore, for purposes of reasonableness, only former customers of Imperial and Elegant will determine the scope of the territory.

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the geographic territory in the non-compete is overly broad, the Court should enforce the non-compete only as to North Carolina under the “blue pencil doctrine.”

North Carolina has adopted the “strict blue pencil doctrine”:

When the language of a covenant not to compete is overly broad, North Carolina’s “blue pencil” rule severely limits what the court may do to alter the covenant. A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant.

Hartman, 117 N.C. App. at 317, 450 S.E.2d at 920. Under this doctrine, the trial court may use its inherent power to enforce the reasonable, divisible provisions of the non-compete. *Welcome Wagon Int’l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961).

We agree with plaintiff that, under the “blue pencil doctrine,” the trial court could have, but chose not to, strike the unreasonable territorial provisions of the non-compete. However, the trial court had authority to enforce the non-compete through paragraph six of the non-compete which specifically and expressly gave the trial court authority to “revise the restrictions . . . to cover the maximum period, scope and area permitted by law.” In other words, the trial court’s ability to revise the non-compete is not subject to the restrictions of the “blue pencil doctrine” which prohibits a trial court from revising unreasonable provisions in non-compete agreements. Instead, here, the parties included a specific provision in the non-compete—specifically, paragraph six—enabling the trial court to revise the non-compete. Given the fact that non-competes drafted based on the sale of a business are given more leniency than those drafted pursuant to an employment contract since the parties are in relatively equal bargaining positions, the trial court should not have held the entire non-compete unenforceable nor should the trial court’s power to revise and enforce reasonable provisions of the non-compete be limited under the “blue pencil doctrine.” Instead, the trial court should have invoked its power under paragraph six and revised the non-compete to make it reasonable based on the evidence before it.

The facts of this case are distinguishable from those in which the trial court’s authority to revise a non-compete is substantially limited by the “blue pencil doctrine” because those non-competes did not give the trial court express authority to revise the agreements. *See Hartman*, 117 N.C. App. at 318, 450 S.E.2d at 920 (ruling that the non-compete “could

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not be saved by ‘blue penciling’”); *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 523, 257 S.E.2d 109, 115 (1979) (noting that “[t]he Court cannot in the absence of clearly severable territorial divisions, enforce the restrictions only insofar as they are reasonable” under the “blue pencil doctrine”). In contrast, pursuant to the sale of a business, these parties, who were at arms-length with equal bargaining power, agreed to allow the trial court to revise the non-compete to make it reasonable, and the trial court should have done so. In sum, unlike previous cases, the parties here specifically contracted to give the court power to revise the scope of the non-compete should part of it be determined to be unenforceable.

While this precise issue has not arisen in our Courts, i.e., the right of a trial court to revise the provisions of a non-compete based on the express language of the contract for the sale of a business, this Court has noted that similar language has appeared in a franchisor-franchisee contract in *Outdoor Lighting Perspectives Franchising, Inc. v. Harders*, __ N.C. App. __, 747 S.E.2d 256 (2013). In *Outdoor Lighting*, __ N.C. App. at __, 747 S.E.2d at 261, the franchise agreement between the parties gave the franchisor the right to reduce the scope of the non-compete, a right which the franchisor attempted to invoke. In looking at this particular provision, the Court noted that “it appears, given the language of the agreement, that [the franchisor] had the right to modify the non-competition provision in this manner and exercised this authority in an appropriate manner.” *Id.* at __, 747 S.E.2d at 265, n.3. However, the Court was not required to “determine the effectiveness of [that] exercise in private ‘blue penciling’” because the modified geographic scope was still unreasonable. *Id.* Although *Outdoor Lighting’s* holding does not directly affect the outcome in this case, it indicates a willingness of our Courts to recognize and enforce revised non-compete agreements when the parties contract for the right to revise a non-compete outside the employment context.

Finally, in recognizing the importance of allowing parties who agree that provisions of a non-compete may be revised in an effort to enforce them, we believe that this practice makes good business sense and better protects both a seller’s and purchaser’s interests in the sale of a business. It not only protects the business interests of the purchaser, which is a notable concern especially in cases where the seller, similar to *Elegant and Imperial*, has spent a substantial amount of time building up goodwill in a particular industry, but it also allows the seller to make more money than it would have had it just sold the assets of the business. This is especially true in North Carolina where our Supreme Court

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has been unwilling to adopt a more flexible approach to the “blue pencil doctrine,” leaving the courts with few options to try to enforce non-compete in a rapidly changing economy.³ In addition, potential buyers may be reluctant to buy a business not only if a seller was unwilling to sign a non-compete but also if that non-compete could not be modified and enforced by the courts. As a final note, it is important to remember that, here, pursuant to the sale of Imperial and Elegant, Ludine agreed to sign the non-compete and was compensated for that agreement as well as getting, arguably, a higher price for the businesses’ assets. Then, after allegedly violating the non-compete and being sued by plaintiff, he asked the courts to hold the negotiated-for non-compete invalid.

In support of its conclusion that the trial court could not have revised the non-compete despite the fact that paragraph six explicitly gave it the power to, the dissent notes that the language of paragraph six limits the trial court’s authority to revise to that “permitted by law.” Thus, according to the dissent, paragraph six “by its very terms makes the ‘blue pencil’ doctrine applicable.” However, this interpretation of the language of paragraph six would construe the provision meaningless. By this logic, the parties would be giving the trial court authority to revise the agreement but, in the same sentence, restrict its power under the “blue pencil doctrine” which expressly prohibits any and all revisions by the trial court.

Instead, in interpreting the language of paragraph six, the phrase “permitted by law” applies to how the trial court revises the agreement, requiring it to revise under the parameters of reasonableness in terms of time and territory. On remand, the trial court is tasked with revising the territorial restrictions of the non-compete to make them reasonable based on the former client base of Imperial and Elegant. Thus, by the terms of this opinion, the trial court is revising the scope in such a way as to make it enforceable, i.e., “permitted,” by law.

For all the above mentioned reasons, we reverse the trial court’s order and remand this matter to the trial court to revise the non-compete provisions after determining where in North Carolina and South Carolina it would be reasonable to enforce the non-compete based on Elegant’s and Imperial’s former customer base.

3. Judge Steelman highlighted this issue in his concurring opinion in *MJM Investigations, Inc. v. Sjostedt*, 205 N.C. App. 468, 698 S.E.2d 202, 2010 WL 2814531, *5 (No. COA09-596) (July 20, 2010) (unpublished), noting that: “The law of restrictive covenants should be re-evaluated by our Supreme Court in the context of changing economic conditions.”

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In addition, although, as a matter of law, the trial court should have revised the non-compete to make it reasonable and enforceable, there exists a genuine issue of material fact as to whether Ludine violated the non-compete. Plaintiff alleged that its customers claimed that Ludine was attempting to solicit their business to Associated Beverage. Although Ludine refutes this in his affidavit, “[c]ontradictions or discrepancies in the evidence must be resolved by the jury rather than the trial judge[.]” *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 481, 562 S.E.2d 887, 897 (2002). Thus, once the trial court revises the non-compete to include only those areas reasonably necessary to protect plaintiff’s business interests, the issue of whether Ludine violated the non-compete should be tried to determine whether Ludine violated the non-compete.

II. Tortious Interference with a Contract

[2] Next, plaintiff argues that the trial court erred in granting summary judgment as to its claim for tortious interference with a contract. Specifically, plaintiff contends that it had implied-in-fact contracts with third parties based on past business dealings and that there is a material issue of fact as to whether defendants interfered with those contracts.

To establish a claim for tortious interference with contract, a plaintiff must show: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Sellers v. Morton, 191 N.C. App. 75, 81, 661 S.E.2d 915, 921 (2008).

Here, plaintiff has forecasted evidence that it had implied contracts with third-party customers. Although it is undisputed that plaintiff did not have express contracts with third-party customers, plaintiff presented evidence showing conduct that created implied contracts. “An implied in fact contract is a genuine agreement between parties; its terms may not be expressed in words, or at least not fully in words. The term, implied in fact contract, only means that the parties had a contract that can be seen in their conduct rather than in any explicit set of words.” *Miles v. Carolina Forest Ass’n*, 167 N.C. App. 28, 35-36, 604 S.E.2d 327, 333 (2004); *see also Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 557, 548 S.E.2d 788, 793 (2001) (“An implied contract refers

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to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding.”). Defendants described the businesses’ relationship with its customers as: “so long as Imperial provided its services competently and at reasonable rates, its customers kept calling back for additional services. So long as Elegant called on its accounts and successfully promoted and sold the coffee and tea products provided to Elegant by its vendors, Elegant continued representing its suppliers.” Thus, there was evidence of a substantial business relationship between the businesses and third-party customers based on the prior dealings between the parties. Accordingly, plaintiff satisfied its burden of showing a genuine issue of fact as to this first element since “the legal effect of an implied in fact contract is the same as that of an express contract in that it too is considered a ‘real’ contract or genuine agreement between the parties[.]” *Miles*, 167 N.C. App. at 36, 604 S.E.2d at 333.

With regard to the second element, it is undisputed defendants knew about those contracts since plaintiff acquired those customers when it purchased Elegant and Imperial. Thus, defendants would have been aware of those contracts. As to the third element, plaintiff has forecasted evidence that Ludine, on behalf of Associated Beverage, induced or attempted to induce the customers to switch their business to defendants.

Regarding the fourth element, this Court has noted that: “In order to demonstrate the element of acting without justification, the action must indicate no motive for interference other than malice.” *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 523, 586 S.E.2d 507, 510 (2003) (internal quotation marks omitted). Plaintiff alleged that defendants maliciously interfered with the contracts in violation of the non-compete. As discussed above, because there is a genuine issue of fact as to whether Ludine violated the non-compete once it has been revised on remand, there is also a genuine issue of fact as to whether he acted without justification.

Finally, with regard to the last element, plaintiff forecasted evidence that it suffered damages in the form of lost business and lost profits. Specifically, plaintiff claimed that although it used to generate \$70,000 in business, it now only generates \$20,000 based on defendants’ alleged interference with third-party customers. Thus, in sum, plaintiff has forecasted evidence for each element of tortious interference with a contract, and the trial court erred in granting defendants’ motion for summary judgment as to this claim.

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III. Tortious Interference with a Prospective Economic Advantage

[3] Next, plaintiff argues that the trial court erred in granting defendants' summary judgment motion on its claim for tortious interference with a prospective economic advantage.

"In order to maintain an action for tortious interference with prospective advantage, a [p]laintiff must show that [the] [d]efendants induced a third party to refrain from entering into a contract with [the] [p]laintiff without justification. Additionally, [the] [p]laintiff must show that the contract would have ensued but for [the] [d]efendants' interference." *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 585, 561 S.E.2d 276, 286 (2002).

Here, as discussed, plaintiff alleged that third-party customers switched their business to defendants instead of continuing their business relationships with plaintiff. Furthermore, as noted above, defendants were not justified in their conduct because, according to plaintiff's contentions, they did so in violation of the non-compete signed by Ludine. Accordingly, there is a genuine issue of fact whether customers refrained from entering into contracts or continuing previous implied contracts with plaintiff but for defendants' unjustified interference. Therefore, the trial court erred in granting summary judgment on this claim.

IV. Unfair and Deceptive Practices or Acts

[4] Next, plaintiff argues that the trial court erred in granting summary judgment as to his claim for unfair and deceptive practices or acts. Specifically, plaintiff contends that since there is a material issue of fact whether defendants solicited business away from plaintiff and whether Ludine's breach of the non-compete was accompanied by aggravating factors, the unfair and deceptive practice claim survives as well.

"Although [N.C. Gen. Stat. § 75-1.1] was intended to benefit consumers, its protections do extend to businesses in appropriate situations." *DaimlerChrysler Corp.*, 148 N.C. App. at 585, 561 S.E.2d at 286. To prevail on a claim of unfair and deceptive practices, a plaintiff must show: "(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998).

Here, plaintiff's unfair and deceptive practices claim rests on its claims for Ludine's breach of the non-compete, tortious interference with contract, and tortious interference with an economic advantage.

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Initially, we note that plaintiff's claims for tortious interference with contract and tortious interference with an economic advantage allege that defendants engaged in an unfair method of competing with plaintiff. As discussed above, since there is a material issue of fact whether defendants solicited business away from plaintiff in violation of the non-compete, plaintiff's allegations may also maintain an unfair and deceptive practice claim.

With regard to plaintiff's contention that its unfair and deceptive practices claim could be based upon Ludine's breach of the non-compete, "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1. The plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act." *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 368, 533 S.E.2d 827, 833 (2000) (internal quotation marks and citations omitted). Here, plaintiff has pled sufficient facts showing aggravating circumstances accompanying Ludine's alleged breach of the non-compete to support its unfair and deceptive practices claim. This Court has noted that "[a]ggravating circumstances include conduct of the breaching party that is deceptive[.]" and, when determining whether conduct is deceptive, "its effect on the average consumer is considered." *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 910 (2002). As discussed, Ludine had been involved in the industry for over fifteen years and had built significant goodwill in this particular area. As part of the sale of Elegant and Imperial, Ludine agreed to sign a non-compete agreement, which would presumably have been an important part of plaintiff's willingness to buy the businesses. Then, according to plaintiff, Ludine purposefully violated it in an effort to solicit customers to his wife's new business. Given that plaintiff has pled facts alleging that Ludine purposefully violated an agreement which served as important consideration for plaintiff's decision to buy Imperial and Elegant, plaintiff has sufficiently pled facts showing the egregious nature of Ludine's breach of the non-compete to survive summary judgment. Accordingly, plaintiff has forecasted evidence that Ludine's breach of the non-compete was deceptive and was sufficient to maintain an unfair and deceptive practice claim.

V. Injunctive Relief

[5] Finally, plaintiff contends that the trial court erred in granting summary judgment on its claim for injunctive relief. Specifically, plaintiff alleges that it has shown the likelihood of success on the merits of its case; thus, it is entitled to pursue injunctive relief.

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“Because a preliminary injunction is an extraordinary measure, it will issue only upon the movant’s showing that: (1) there is a likelihood of success on the merits of his case; and (2) the movant will likely suffer irreparable loss unless the injunction is issued.” *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004) (internal quotation marks omitted). Here, because it held the non-compete unenforceable, the trial court necessarily found that plaintiff failed to show there was a likelihood of success on its breach of contract claim. However, as discussed above, because we are reversing the trial court’s order and remanding the non-compete to the trial court to exercise its authority to revise the geographic scope of the non-compete based on paragraph 6 of the non-compete, the trial court must determine whether there is a likelihood of success on the merits of plaintiff’s breach of contract claim based on the revised non-compete. Should the trial court conclude there is, it must also determine “whether the issuance of the injunction is necessary for the protection of plaintiff’s rights during the course of litigation; that is, whether plaintiff has an adequate remedy at law.” *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 406, 302 S.E.2d 754, 762 (1983). Based on these considerations, the trial court should determine whether plaintiff is entitled to injunctive relief.

Conclusion

Because the trial court had the express authority to revise the geographic scope of the non-compete based on the terms of the agreement, we remand for the trial court to revise the territorial area of the non-compete to include those areas where Elegant and Imperial had former customers. Since there is a genuine issue of material fact whether Ludine violated the revised non-compete, we reverse the order granting summary judgment on plaintiff’s breach of contract claim. In addition, we conclude that plaintiff has presented evidence showing a genuine issue of material fact on its remaining tort claims and request for injunctive relief. Therefore, we reverse the order granting summary judgment on those claims and remand for trial.

REVERSED AND REMANDED.

Judge McGEE concurs.

ELMORE, Judge., dissenting.

Because I believe the “blue pencil” doctrine applies to the parties’ provision in the non-compete purportedly enabling the trial court to

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rewrite or modify the unreasonable territory restrictions, I would affirm the trial court's order granting summary judgment for defendants on plaintiff's claim of breach of the non-compete. I would also affirm the trial court's order granting defendants' motion for summary judgment on plaintiff's cause of action for tortious interference with a contract because plaintiff did not forecast enough evidence of conduct to show that it formed an implied contract-in-fact with its customers. As such, plaintiff's claims for tortious interference with a prospective economic advantage, unfair and deceptive trade practices, and injunctive relief would necessarily fail, and I would affirm the trial court's order as to those issues.

I. Analysis**a.) Breach of the non-compete**

Plaintiff argues that the trial court erred in granting defendants' motion for summary judgment on plaintiff's claim for breach of the non-compete. I disagree.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). We must consider "the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party[.]" *Pine Knoll Ass'n, Inc. v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997).

While I agree with the majority that the geographic area covered by the non-compete was overbroad and thus unreasonable, the majority further concludes that "the trial court had authority to enforce the non-compete through paragraph six of the non-compete which specifically and expressly gave the trial court authority to 'revise the restrictions' 'to cover the maximum period, scope and area permitted by law.'" Thus, the majority rules that the "blue pencil" doctrine is inapplicable in the present case due to the parties' aforementioned agreed upon provision.

Parties to a contract "may bind themselves as they see fit . . . unless the contract would violate the law or is contrary to public policy." *Lexington Ins. Co. v. Tires Into Recycled Energy & Supplies, Inc.*, 136 N.C. App. 223, 225, 522 S.E.2d 798, 800 (1999) (citation and quotation marks omitted). The "blue pencil" doctrine, in part, serves to prevent a court from "draft[ing] a new contract for the parties." *Seaboard Indus.*,

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Inc. v. Blair, 10 N.C. App. 323, 337, 178 S.E.2d 781, 790 (1971). The doctrine drastically restricts a court's authority to modify an overly broad territory restriction: "A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant." *Hartman v. W.H. Odell & Associates, Inc.*, 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994).

Here, the provision that purportedly gives the trial court authority to rewrite the non-compete's unreasonable territory restrictions states, in part:

If, at the time of enforcement . . . a court holds that the restrictions stated herein are unreasonable under the circumstances then existing, the parties hereto agree that . . . the court shall be allowed to revise the restrictions contained . . . to cover the maximum period, scope and area **permitted by law.**"

(emphasis added). The language of the provision expressly limits a court's revision to that "permitted by law." Thus, the provision by its very terms makes the "blue pencil" doctrine applicable. Alternatively, the provision is unenforceable as it violates the "blue pencil" doctrine on its face. Under either scenario, the "blue-pencil" doctrine applies.

The trial court was correct by not *rewriting* the non-compete to make it reasonable because the law makes clear that a court cannot engage in such action. However, the trial court has the authority to *enforce* portions of a non-compete that are reasonable and disregard the remaining portions if the non-compete divides the restricted area into distinct units. See *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961). While the non-compete in the case at bar divides the restricted territory into North Carolina and South Carolina, the trial court did not enforce any portion of the non-compete because neither of those restrictions taken separately are reasonable, even in light of the deference given towards non-compete covenants resulting from business sales. In sum, the non-compete's territory restrictions were unreasonable, and the trial court was without legal authority to rewrite or modify the territory restrictions irrespective of the parties' contractual provision providing otherwise.

While the majority relies on *Outdoor Lighting Perspectives Franchising, Inc. v. Harders*, ___ N.C. ___ App. ___, 747 S.E.2d 256 (2013) in support of its holding, that case addressed a franchisor's (a party to the non-compete), as opposed to a trial court's, right to modify

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a non-compete outside the context of a business sales contract. *Id.* at ___, 747 S.E.2d at 265, n.3. The majority asserts that *Outdoor Lighting* “indicates a willingness of our courts to recognize and enforce revised non-compete agreements[.]” However, the majority’s ruling in this case takes a far more drastic approach, ordering the trial court to undertake the revising and rewriting of the non-compete rather than the contracting party.

In light of these reasons, I would affirm the trial court’s order granting summary judgment for defendants on plaintiff’s claim of breach of the non-compete because the covenant is unenforceable and invalid.

b.) Tortious Interference With a Contract

Next, the majority agrees with plaintiff’s argument that the trial court erred in granting defendants’ motion for summary judgment on plaintiff’s cause of action for tortious interference with a contract. Plaintiff avers that a contract implied-in-fact existed between itself and its customers acquired from the agreement. I disagree.

The first element of tortious interference with contractual rights is “(1) the existence of a valid contract between plaintiff and a third party[.]” *Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 462, 524 S.E.2d 821, 826 (2000) (citation omitted). Mutual assent of both parties to the terms of a contract “is essential to the formation of any contract . . . so as to establish a meeting of the minds.” *Connor v. Harless*, 176 N.C. App. 402, 405, 626 S.E.2d 755, 757 (2006) (citation and quotation omitted). Mutual assent is typically formed “by an offer by one party and an acceptance by the other, which offer and acceptance are *essential* elements of a contract.” *Id.* (citation and quotation omitted) (emphasis in original). An implied contract-in-fact is “as valid and enforceable as an express contract.” *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citation omitted). The formation of an implied contract “arises where the intent of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts.” *Id.* (citation omitted). The conduct of the parties shall imply an offer and acceptance. *Revels v. Miss Am. Org.*, 182 N.C. App. 334, 337, 641 S.E.2d 721, 724 (2007).

Here, plaintiff concedes that “there are no written [customer] contracts. The [defendants] didn’t have any when they sold the business nor did [plaintiff].” However, plaintiff alleges that defendants “w[ere] aware of the contracts and customers transferred to [plaintiff] at the time of purchase of the Business.”

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In support of its contention that a contract implied-in-fact existed with customers, plaintiff referenced 1.) Gandino's affidavit stating that plaintiff conducted business with customers who "had engaged in a regular course of conduct and business relationships with Imperial and/or Elegant since at least 2007"; and 2.) Ludine Dotoli's affidavit that "the arrangement was that so long as Imperial provided competent services at reasonable rates, its customers kept calling back for additional services. So long as Elegant called on its account and successfully promoted and sold the coffee and tea products provided to it by its vendors, Elegant continued representing its suppliers." Contrary to the majority's holding, the forecast of evidence put forth by plaintiff suggesting a general business relationship with its customers was insufficient evidence to constitute an offer, acceptance, mutual assent, or obligation to fulfill specific terms of an agreement. Thus, I would affirm the trial court's order granting defendants' motion for summary judgment on this issue because plaintiff did not forecast enough evidence of conduct to show that it formed an implied contract-in-fact with its customers.

c.) Tortious Interference With a Prospective Economic Advantage

Plaintiff also argues that the trial court erred in granting defendants' motion for summary judgment on plaintiff's cause of action for tortious interference with a prospective economic advantage. I disagree.

A plaintiff bringing a cause of action for tortious interference with a prospective economic advantage must establish that "the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff, which would have been made absent the defendant's interference." *MLC Auto., LLC v. Town of S. Pines*, 207 N.C. App. 555, 571, 702 S.E.2d 68, 79 (2010) (citation omitted).

As previously discussed, plaintiff did not establish the existence of any contracts with its customers. Thus, plaintiff's forecast of evidence necessarily does not and cannot identify any actual contract that defendants induced customers to refrain from entering. Moreover, plaintiff never specifically alleges defendants' inducement to refrain from entering a contract, but merely states, "[a]bsent the Defendants' interference, [plaintiff] would have maintained its customer base[.]" "Defendants have purposely and intentionally interfered with the contracts . . . of [plaintiff] with the intent to steal the customers[.]" "Defendants have directly contacted and solicited the customers of [plaintiff][.]" and "Defendants have interfered with [plaintiff's] business relationships[.]"

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While plaintiff had an expectation of a business relationship with its customers, it forecasts no evidence in the record to show that but for defendants' actions, contracts with its customers would have been formed. Plaintiff merely makes general and speculative allegations regarding potential future contracts: "As a result of Defendants' interference with [plaintiff's] business relationships and business expectancy, [plaintiff] has suffered damages . . . in excess of \$10,000.00." Plaintiff's expectation of a business relationship with current customers is insufficient by itself to establish a tortious interference with a prospective economic advantage claim. *See Dalton v. Camp*, 353 N.C. 647, 655, 548 S.E.2d 704, 710 (2001) (rejecting a claim for tortious interference with a prospective economic advantage claim because "while [plaintiff] may have had an expectation of a continuing business relationship with [customer], at least in the short term, he offers no evidence showing that but for [defendant's] alleged interference a contract would have ensued"). Thus, I would affirm the trial court's order granting summary judgment in favor of defendants on this issue.

d.) Unfair and/or Deceptive Trade Practices

Next, plaintiff argues that the trial court erred in granting summary judgment for defendants on plaintiff's claim for unfair and deceptive trade practices. I disagree.

Plaintiff contends that claims involving breach of a covenant not to compete, tortious interference with contracts, and tortious interference with a prospective economic advantage form the basis for claims of unfair and deceptive trade practices. Even if we assume *arguendo* that this is true under North Carolina law, plaintiff argues that the trial court erred in granting summary judgment on the issue of unfair and deceptive trade practices because "[plaintiff] has set forth sufficient evidence to establish material questions of fact as to each element of its claims" for tortious interference with a contract, tortious interference with a prospective economic advantage, and breach of the non-compete. Since I would rule that plaintiff failed to establish genuine issues of material facts on those claims, plaintiff's claim for unfair and deceptive trade practices would necessarily also fail.

e.) Injunctive Relief

Finally, plaintiff argues that it is entitled to injunctive relief because it has established that the trial court erred in granting summary judgment for defendants. However, since I would hold that the trial court did not err in granting summary judgment, plaintiff's argument for injunctive relief would be meritless.

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II. Conclusion

In sum, I would affirm the trial court's order granting defendants' motion for summary judgment because no genuine issue of material fact exists as to plaintiff's claims for breach of the non-compete, tortious interference with a contract, tortious interference with a prospective economic advantage, unfair and deceptive trade practices, and injunctive relief.

CHRISTINA D'ALESSANDRO, PLAINTIFF

v.

ADAM D'ALESSANDRO, DEFENDANT

No. COA14-58 & COA14-68

Filed 5 August 2014

1. Contempt—civil—appointment of counsel—possibility of incarceration

The trial court erred in a civil contempt and child custody case by ordering that defendant be incarcerated for civil contempt without the benefit of appointed counsel to represent him at the hearing that resulted in his incarceration.

2. Child Custody and Support—motion to modify—insufficient findings of fact and conclusions of law

A custody order denying defendant's motion to modify the custody of his younger two children was remanded for additional findings of fact and conclusions of law fully addressing defendant's motion to modify custody.

Appeal by defendant from Orders entered 2 July 2013 and 12 July 2013 by Judge Lori G. Christian in District Court, Wake County. Heard in the Court of Appeals 21 May 2014.

Lane & Lane, PLLC by Freddie Lane, Jr. and Melissa C. Rush-Lane, for defendant-appellant.

No appellee brief filed.

STROUD, Judge.

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Defendant appeals from two orders, one addressing motions by both parties for contempt as to a child custody order and defendant’s motion to modify custody, and the other holding defendant in civil contempt for failure to pay child support as ordered. For the reasons stated below, we reverse the orders holding defendant in civil contempt due to the trial court’s failure to inquire as to defendant’s desire for counsel and his ability to pay for legal representation. We remand the order as to modification of custody for additional findings of fact.

I. Background

The parties were married on 27 May 2000 and two children were born to their marriage—Madeline¹, born in 2002, and Cathy, born in 2004. Plaintiff also has a son, Andy, born in 1997 from a prior relationship, who was not adopted by defendant. On 28 January 2011, plaintiff filed a lawsuit in Wake County District Court, File No. 11 CVD 1280, seeking temporary and permanent custody as well as an emergency custody order of the two children of the marriage. On 14 February 2011, defendant filed his answer and counterclaims to the custody complaint, seeking custody of the two children of the marriage and also including a counterclaim for custody of Andy. On 13 May 2011, the trial court entered an order for temporary custody, granting the parties joint legal custody of the two children of the marriage, with primary physical custody to plaintiff, and granting sole legal custody of Andy to plaintiff.

On 27 June 2011, Wake County Child Support Enforcement filed a complaint in Wake County District Court, File No. 11 CVD 9780, for child support on behalf of Christina D’Alessandro, seeking to establish child support for the two children of the marriage. A child support order (“child support order”) was entered on 2 December 2011. This order found that defendant had voluntarily left his employment with Advanced Irrigation Repair, where he was earning \$2600.00 per month, and that he had 20 years of experience in landscape irrigation. The trial court further found that defendant had not provided any support to plaintiff since July 2011. The child support order set defendant’s child support obligation in the amount of \$607.00 per month, effective 1 July 2011, and established child support arrears owed by defendant of \$3035.00, to be paid at the rate of \$13.00 per month.

During 2011, the parties, mostly defendant, filed numerous motions regarding custody disputes—defendant filed at least eleven—but we will not address the details of these motions and resulting orders as they

1. We will use pseudonyms to protect the privacy of the minor children.

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are not relevant to the issues in this appeal. Ultimately, on 26 April 2012, the trial court entered an order for permanent custody in Wake County File No. 11 CVD 1280 which granted sole legal and physical custody of all three children to plaintiff. However, the trial court also found that defendant was a “de facto” parent of Andy and that plaintiff had acted in a manner inconsistent with her constitutionally protected rights as a parent in creating a family unit with defendant and allowing defendant to share decision-making responsibilities as a parent of Andy, and granted defendant visitation with Andy.

The trial court made extensive findings as to defendant’s animosity toward plaintiff, his controlling behaviors, his anger and inability to communicate with plaintiff, his disparaging comments about plaintiff to the children, his inappropriate discussions with the children about the plaintiff and the difficulties that the extensive conflict between the parents was causing the children. This order set out a detailed visitation schedule, required the parties to communicate through Our Family Wizard for the next 18 months, to have Andy and Cathy engage in therapy, and to participate in the children’s therapy as recommended by the therapist.

Some other relevant requirements of the custody order were for defendant to pay half of “uninsured medical and counseling expenses for the minor children;” to register for an anger management class within 30 days; to pay plaintiff’s attorney fees in the amount of \$5,000.00, to be paid at a rate of \$100.00 per month starting on 1 May 2012; and not to remove the children from school without written consent from plaintiff except for regular visitation.

On 27 August 2012, the trial court entered an order granting plaintiff’s motion to intervene as plaintiff in the child support action and removing the matter from the “IV-D docket and transfer[ing] to the courtroom of the assigned family court District Court Judge for all further hearings.” This order also released the attorneys for Wake County Human Services Child Support Enforcement as attorneys of record.

During 2012, both before and after entry of the child support order and custody order noted above, the parties filed various motions and several orders were entered, most of which are not relevant for the purposes of this appeal. Overall, these motions and orders demonstrate that the parties continued to have many disputes regarding visitation, and defendant persistently continued to fail to pay child support as ordered. Of these numerous motions, we will discuss only the motions which

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were addressed in the trial court's orders now on appeal and which are relevant to the issues raised on appeal² :

1. On 7 May 2012, plaintiff filed a motion for order to show cause in File No. 11 CVD 1280 as to defendant's failure to pay \$100 per month towards her attorney fees and to abide by the child custody order in various ways.

2. On or about 2 November 2012³, defendant served upon plaintiff a motion *pro se* in file No. 11 CVD 1280 to modify child custody and visitation and child support, based on allegations regarding plaintiff's remarriage, claims of her emotional and physical neglect of the children, and that plaintiff had "committed (sic) fraud to obtain the current order."

3. On 10 May 2013, plaintiff filed a motion for an order to show cause in File No. 11 CVD 9780 as to defendant's failure to pay child support in violation of the child support order, alleging that he had paid only \$26.00 since the 20 February 2013 hearing.

All of these motions, filed in both court files, were heard by the trial court on 20 February 2013. Plaintiff was represented by counsel, and defendant appeared *pro se*. The trial court entered two orders as a result of this hearing:

1. On 2 July 2013, in file No. 11 CVD 1280, the trial court entered an order on civil contempt and on defendant's motion to modify custody which allowed defendant's motion to modify custody but ordered only that defendant would no longer have the same visitation with Andy as the other two children and that Andy would be permitted to initiate visitation in the future; held defendant in civil contempt as to his failure to comply with the custody order; and held that defendant would be required to pay plaintiff's attorney's fees as set forth in the order in File No. 11 CVD 9780.

2. On 12 July 2013, in File No. 11 CVD 9780, the trial court held defendant in civil contempt for failure to pay child support in the amount of \$10,933.00; awarded plaintiff \$10,000.00 in attorney fees, to be paid at a rate of \$1000.00 per month; and remanded defendant into custody of the Sheriff of Wake County, to remain until paying \$10,000.00 to purge

2. The orders disposed of the other pending motions but neither party has challenged the trial court's disposition of those motions on appeal.

3. Defendant's motion for modification apparently was not filed with the trial court prior to the hearing but was served upon plaintiff's counsel and this motion was heard by the consent of the parties.

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himself of contempt, which sum would be first applied to child support arrearages and then to attorney's fees.

Defendant timely filed notice of appeal from both orders. Both appeals were heard by this panel on the same hearing date. Although the trial court did not formally consolidate the two actions, both were heard together and as a practical matter, were treated as consolidated. We have therefore consolidated these cases for purposes of the appeals and issue one opinion addressing both.

II. Contempt

[1] Defendant raises the issue of the trial court's failure to inquire as to his desire for appointed counsel when it considered plaintiff's motions for contempt. In one order, defendant was held in civil contempt for his failure to comply with various provisions of the custody order, including his failure to pay for uninsured counseling expenses and to pay the attorney's fees at the rate of \$100.00 per month, and in the other, he was held in civil contempt for failure to pay child support as required by the child support order. The trial court, in both cases,⁴ "immediately remanded [defendant] into the custody of the Wake County Sheriff's Department," to "remain in custody until such time as he has purged his contempt by paying \$10,000.00."

Where a defendant faces the potential of incarceration if held in contempt, the trial court must inquire into the defendant's desire for and ability to pay for counsel to represent him as to the contempt issues. *King v. King*, 144 N.C. App. 391, 394-95, 547 S.E.2d 846, 848 (2001). A defendant may waive his right to representation but the record must reflect that he was advised of this right and he must voluntarily waive it. *See id.* This requirement has been long established by both the United States Supreme Court and the North Carolina Supreme Court:

In light of the Supreme Court's opinion in *Lassiter*, we now hold that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages. . . .

At the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood

4. The trial court actually included this provision in the order entered in File No. 11 CVD 9780, but ordered in File No. 11 CVD 1280 that "Defendant is held in civil contempt under the terms and conditions set forth in the contempt order in Wake County File No. 11 CVD 9780."

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that the defendant may be incarcerated. If the court determines that the defendant may be incarcerated as a result of the proceeding, the trial court should, in the interest of judicial economy, inquire into the defendant’s desire to be represented by counsel and into his ability to pay for legal representation. If such a defendant wishes representation but is unable due to his indigence to pay for such representation, the trial court must appoint counsel to represent him.

McBride v. McBride, 334 N.C. 124, 131-32, 431 S.E.2d 14, 19 (1993).

At the hearing on 20 February 2013, when all of the pending motions were heard, defendant appeared *pro se*. There was obviously a likelihood that defendant may be incarcerated if held in contempt, as he had been previously held in contempt and incarcerated after a prior motion, and on 20 February 2013 defendant had to respond to two show cause orders, one alleging violation of the custody order and one alleging violation of the child support order. But there is no indication in the record that defendant was advised of his right to have counsel appointed to represent him on the contempt motions at this hearing. The only mention of the issue appears in the transcript, after a long colloquy during which the trial court identified all of the various pending motions filed by both parties which were to be heard that day:

THE COURT: Okay. Now, I’m moving on to your motions, Mr. Williams.

MR. WILLIAMS: Yes, Your Honor. May 7th, 2012 motion to show cause. [Pause.]

MR. WILLIAMS: And that should’ve been— an order was issued in that as well.

THE COURT: And Mr. D’Alessandro has signed waivers, I’m assuming.

MR. WILLIAMS: This is the one where he was, Your Honor, wanted for arrest. I’m assuming he has.

THE COURT: Do you have a copy of that order? Of that order to show cause?

MR. WILLIAMS: I’ve got the motion.

Unfortunately, it appears from our record that Mr. Williams’ assumption—that defendant had signed waivers—was unfounded. Perhaps

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he had signed waivers at other hearing dates, as this matter had been rescheduled several times, but nothing in the record in either File No. 11 CVD 1280 nor File No. 11 CVD 9780 shows that he waived his right to counsel for the hearing on 20 February 2013. And it would appear that had the trial court inquired, defendant might have been found, at least potentially, to be indigent and thus entitled to court-appointed counsel, as he claimed to be unable to pay the sums ordered by the trial court. *Cf. Young v. Young*, ___ N.C. App. ___, ___, 736 S.E.2d 538, 544 (2012) (noting that a defendant must show that he is indigent to be entitled to court-appointed counsel). Throughout the hearing, defendant steadfastly insisted he could not afford to pay plaintiff:

[Defendant]: . . . I can’t financially comply. I can’t be in compliance. As much as I try to honor, you know, every order out of the court, physically it’s impossible to live, eat, and pay all that is required.

. . . .

[Defendant]: That is all cumulative total of the 115, the 200 percent of my income that is tied up in these orders that is—where do I start? At the point of separation, we were \$750,000 in debt, and I have some paperwork in here to verify that.

[Court]: How much were you in debt?

[Defendant]: About \$750,000, Your Honor.

[Court]: That’s marital debt?

[Defendant]: That was both marital and business. It was all together.

[Court]: Okay. And?

[Defendant]: She has since gone through the bankruptcy process. But quite honestly, I can’t even afford to file for bankruptcy. Business bankruptcy costs about \$30,000 in attorneys fees. And a personal bankruptcy, Chapter 13, would be at least \$3,000.

We must therefore “conclude that the trial court erred by ordering that the defendant be incarcerated for civil contempt without the benefit of appointed counsel to represent him at the hearing resulting in his incarceration.” *McBride*, 334 N.C. at 132, 431 S.E.2d at 20. Accordingly, we reverse both orders to the extent that they hold defendant in contempt of the custody order and the child support order.

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III. Modification of custody

[2] Although the orders must be reversed as to the contempt provisions as discussed above, defendant did not have any right to appointment of counsel to represent him regarding his November 2012 motion to modify the custody order, so we will address his arguments regarding the provisions of the 2 July 2013 order as to modification of custody. The trial court's order of 2 July 2013 addresses modification of custody to a very limited extent. The only findings of fact which could be considered as relevant to the modification issue⁵ are as follows:

7. The minor child [Andy] did not exercise visitation with Defendant for several months.
8. The Court spoke with [Andy] and finds that
 - a. the minor child loves the Defendant but feels that the Defendant has purposefully rejected him as demonstrated by Defendant's unwillingness to hug the child prior to today's hearing;
 - b. the minor does now and always has considered Defendant to be his father but considers prior actions of Defendant to be further evidence that Defendant has rejected him, including Defendant's earlier choice not to visit with the child.
9. The custody order was violated in that [Andy] did not visit with the Defendant; however, the lack of visitation was not willful on the part of the Plaintiff because the minor child refused to go based on his belief that Defendant had rejected him.
10. The parties agree at the hearing that there has been a substantial change in circumstances affecting the minor child [Andy] such that a modification of his custody and visitation is warranted.
11. It is in the best interest of the minor child that he have some contact with the Defendant that is initiated by the Defendant but that visitation with Defendant should be modified from the prior order.

5. These findings seem mostly directed to address the defendant's motion to hold plaintiff in contempt as to denial of visitation with Andy, an issue defendant has not raised on appeal. But as they address some of the visitation issues, they could be considered as relevant to the motion to modify custody.

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Based on these findings of fact and the conclusion of law that “[t]here has been a substantial change in circumstances affecting the welfare of the minor child [Andy] as to warrant a modification of his custody and visitation[,]” the trial court ordered as follows:

3. The Defendant’s motion to modify child custody is granted as to the visitation provision relating to [Andy] as follows:
 - a. Defendant shall have no further visitation obligation in regards to the minor child, [Andy,] unless initiated by [Andy];
 - b. Defendant shall initiate a dinner visit with the minor child within 1 month of this hearing (February 20, 2013);
 - c. Defendant shall not make any negative comments to the minor child regarding Plaintiff or her spouse. Defendant shall not discuss custody or custody related matters with [Andy].

On appeal from this order, defendant argues that the trial court failed to make findings of fact and conclusions of law fully addressing his motion to modify custody. Although there were several motions heard on 20 February 2013, defendant correctly points out that his evidence as to the motion to modify custody took up most of the time devoted to the hearing. In fact, when the trial court was reviewing the various pending motions and determining how to proceed to hear them all in an orderly manner, plaintiff’s counsel agreed that defendant should present his evidence first, stating that “I believe the longer hearing is going to be his motion to modify custody, and that’s his burden.”

Defendant alleged several reasons to modify custody for all three children in his motion, and his evidence addressed these reasons as to all three children. Specifically, defendant presented evidence regarding his claims that plaintiff had “emotionally and physically neglected” the three children, not just Andy. His motion requested “51% legal and physical” custody of all three children, and at the hearing, he clarified that he was asking to be granted primary physical and legal custody of all three children. Defendant argues that “the court order is devoid of any findings, conclusions or decree with respect to” the two biological children of the parties and that the trial court “should have ruled upon whether there was sufficient evidence to warrant modification of the permanent custody order with respect to the younger children.”

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Defendant does not challenge the limited findings of fact and conclusion of law as to the modification of the custody order regarding Andy, but argues that the trial court simply failed to address his motion for modification of custody as to the two younger biological children of the marriage, and he is correct. The order is devoid of any mention of the fact that he sought complete modification of the custodial arrangements for all three children. Thus, we cannot review the trial court's determinations as to the other two children.

Our Supreme Court has explained why it is essential for trial courts to include a specific finding of a substantial change in circumstances affecting the welfare of the child prior to modifying a custody order:

A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Requiring this specific finding also ensures the modification is truly necessary to make a custody order conform to changed conditions when they occur. Finally, such findings are required in order for the appellate court to determine whether the trial court gave due regard to the factors expressly listed in N.C. Gen. Stat. § 50-13.7.

Davis v. Davis, ___ N.C. App. ___, ___, 748 S.E.2d 594, 599 (2013) (citations and quotation marks omitted).

It would appear from the lack of findings of fact and conclusions of law as to the two biological children that the trial court did not find defendant's requests to be supported by the facts, the law, or perhaps both, but still the trial court needs to make findings of fact so that it is clear that defendant's motion to modify custody was addressed in full.

The need for this type of finding is even greater in a case such as this, which has been protracted and contentious, to the detriment of all three children. The absence of these findings of fact and conclusions of

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law serves to “invite constant litigation by a dissatisfied party so as to keep the involved child[ren] constantly torn between parents and in a resulting state of turmoil and insecurity.” *Id.* We must therefore remand the order concerning modification of custody to the trial court to make additional findings of fact and conclusions of law addressing the denial of defendant’s motion to modify custody as to the two younger children. The trial court need not make any additional findings as to Andy, as the order modified visitation as to Andy and defendant has not challenged this modification on appeal.

IV. Conclusion

For the reasons stated above, the orders of 2 July 2013 and 12 July 2013 are reversed as to any provisions holding defendant in civil contempt of the trial court’s prior orders, and the order of 2 July 2013 is remanded to the trial court for additional findings of fact and conclusions of law addressing its denial of defendant’s motion for modification of custody of the two younger children.

12 July 2013 Order in 11 CVD 9780: REVERSED.

2 July 2013 Order in 11 CVD 1280: REVERSED in part, REMANDED in part.

Judges STEPHENS and McCULLOUGH concur.

ETHERIDGE v. CNTY. OF CURRITUCK

[235 N.C. App. 469 (2014)]

E. RAY ETHERIDGE, FRED G. ETHERIDGE, AND
MARY KATHERINE R. ETHERIDGE, PLAINTIFFS

v.

COUNTY OF CURRITUCK; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS;
AND JOHN D. RORER, MARION GILBERT, O. VANCE AYDLETT, JR., H.M. PETREY,
J. OWEN ETHERIDGE, PAUL MARTIN, AND S. PAUL O'NEAL AS MEMBERS OF THE
CURRITUCK COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA13-834

Filed 5 August 2014

1. Appeal and Error—interlocutory orders and appeals—Rule 54(b) certification

An appeal from an interlocutory order in a rezoning case was heard on the merits where the trial court certified pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there was no just reason to delay appeal of those claims.

2. Zoning—spot zoning—no reasonable basis

The trial court did not err by granting summary judgment in favor of plaintiffs as to their claim for illegal spot zoning. Defendants conceded that the rezoning constituted spot zoning as defined and the evidence did not show that there was a reasonable basis for the rezoning.

3. Attorney Fees—rezoning—government acted outside legal authority—no abuse of discretion

The trial court did not err in a rezoning case by denying plaintiffs' request for attorney fees. Under the plain language of N.C.G.S. § 6-21.7, a trial court must find that: (1) a local government acted outside the scope of its legal authority; and (2) that the act in question constituted an abuse of discretion before the court is required to award attorney fees. In this case, the trial court did not explicitly find that defendant abused its discretion in its rezoning decision and there was sufficient evidence for the trial court to decide that the rezoning was not an abuse of discretion.

Appeal by plaintiffs and defendants from order entered 25 April 2013 by Judge Walter H. Godwin, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 22 January 2014.

Currin & Currin, by Robin T. Currin and George B. Currin, for plaintiffs.

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Currituck County Attorney Donald I. McRee, Jr., for defendants.

CALABRIA, Judge.

Currituck County (“the County”) and the Currituck County Board of Commissioners (“the Board”) (collectively “defendants”) appeal from the portion of the trial court’s order granting summary judgment in favor of E. Ray Etheridge, Fred G. Etheridge, and Mary Katherine R. Etheridge (collectively “plaintiffs”) as to plaintiffs’ claim of illegal spot zoning. Plaintiffs appeal the portion of the trial court’s order denying their request for attorney’s fees and costs pursuant to N.C. Gen. Stat. § 6-21.7 (2013). We affirm.

I. Background

This appeal concerns a dispute over a 1.1 acre parcel of land (“the property”) owned by Currituck Grain, Inc. (“Currituck Grain”) in the town of Shawboro in Currituck County, North Carolina. Prior to 5 December 2011, the property was zoned agricultural under Currituck County’s Unified Development Ordinance (“the UDO”). The adjoining parcels of land on three sides of the property were also zoned agricultural, and the parcel on the remaining side of the property was zoned general business.

Currituck Grain entered into a contract with Daniel Clay Cartwright (“Cartwright”) by which Cartwright would purchase the property to establish what he called a “recycling center,” which would handle, stockpile, and sell scrap metal and materials, rock, mulch, concrete, and dirt. Cartwright’s proposed use was not permitted in an agricultural zoning district, but it was permitted in a heavy manufacturing zoning district with a special use permit.

On 23 September 2011, Cartwright submitted an application to have the property rezoned to Conditional District – Heavy Manufacturing. The County Planning Board (“the Planning Board”) reviewed Cartwright’s rezoning application (“the application”) and recommended that it should be denied because, *inter alia*, the proposed use was inconsistent with the current rural zoning classification and was inconsistent with the County’s comprehensive land use plan. The Board then conducted a hearing regarding the application on 5 December 2011. At the conclusion of the meeting, the Board voted 6-1 to approve the application.

On 25 January 2012, plaintiffs filed a complaint against defendants in Currituck County Superior Court seeking to have the rezoning of the property invalidated. Plaintiffs’ complaint included claims of illegal spot

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zoning, arbitrary and capricious rezoning, and violation of due process. Plaintiffs sought a preliminary and permanent injunction against the rezoning as well as attorney's fees and costs pursuant to N.C. Gen. Stat. § 6-21.7. On 23 March 2012, plaintiffs filed an amended complaint which added an additional claim for violation of N.C. Gen. Stat. § 153A-341 and the UDO. Plaintiffs then filed a motion for summary judgment as to all claims other than their claim for a preliminary and permanent injunction. After a hearing, the trial court entered an order granting summary judgment in favor of plaintiffs as to their claim for illegal spot zoning and denying plaintiffs' request for attorney's fees. The trial court also denied plaintiffs' motion for summary judgment as to their remaining claims. Plaintiffs and defendants each appeal.

II. Jurisdiction

[1] As an initial matter, we note that this appeal is interlocutory because the trial court's order did not resolve all of plaintiffs' claims since it explicitly denied both parties summary judgment as to those remaining claims and there is no subsequent final disposition of those claims in the record. Appeal from an interlocutory order is proper if

(1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

Myers v. Mutton, 155 N.C. App. 213, 215, 574 S.E.2d 73, 75 (2002). In the instant case, the trial court's order entered final judgments as to plaintiffs' claims for illegal spot zoning and attorney's fees and certified pursuant to Rule 54(b) that there was no just reason to delay appeal of those claims. Accordingly, this appeal is properly before us. *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("When the trial court [properly] certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory.").

III. Defendants' Appeal – Spot Zoning

[2] Defendants' sole argument on appeal is that the trial court erred by granting summary judgment in favor of plaintiffs as to plaintiffs' claim for illegal spot zoning. We disagree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C.

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569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Spot zoning is defined, in pertinent part, as a zoning ordinance or amendment that “singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to . . . relieve the small tract from restrictions to which the rest of the area is subjected.” *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972), quoted in *Chrismon [v. Guilford Cty.]*, 322 N.C. [611,] 627, 370 S.E.2d [579,] 588-89 [(1988)] The practice [of spot zoning] may be valid or invalid, depending on the facts of the specific case. *Chrismon*, 322 N.C. at 626, 370 S.E.2d at 588. In order to establish the validity of such a zoning ordinance, the finder of fact must answer two questions in the affirmative: (1) did the zoning activity constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning. *Id.* at 627, 370 S.E.2d at 589.

Good Neighbors of S. Davidson v. Town of Denton, 355 N.C. 254, 257-58, 559 S.E.2d 768, 771 (2002) (footnotes omitted).

In the instant case, defendants conceded at oral arguments that the rezoning at issue constituted spot zoning as defined by our Supreme Court. However, they still contend that summary judgment in favor of plaintiffs was inappropriate because the undisputed evidence is that there was a reasonable basis for the rezoning. Defendants are mistaken.

In order to determine whether there was a reasonable basis for a spot zoning, this Court considers the following factors:

(1) “the size of the tract in question”; (2) “the compatibility of the disputed zoning action with an existing comprehensive zoning plan”; (3) “the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and” (4) “the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.” *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589. With these factors in mind, “the criteria are flexible, and the specific analysis used depends on the facts and circumstances of a particular case.” *Id.*

Childress v. Yadkin Cty., 186 N.C. App. 30, 37, 650 S.E.2d 55, 61 (2007).

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In the instant case, the first two factors, the size of the tract and the compatibility of the rezoning with the County's comprehensive plan, clearly weigh against the reasonableness of the rezoning. The rezoned property is only 1.1 acres in size and, as noted by the Planning Board, the rezoning is inconsistent with the County's comprehensive plan. In their brief, defendants do not dispute that these factors should weigh against the rezoning's reasonableness. Instead, defendants argue that, consistent with *Chrismon*, the third and fourth factors support a determination that there was a reasonable basis for the spot zoning. See *Chrismon*, 322 N.C. at 633-34, 370 S.E.2d at 592 ("[W]e find that, because of the quite substantial benefits created for the surrounding community by the rezoning and because of the close relationship between the likely uses of the rezoned property and the uses already present in the surrounding tracts, there was a clear showing of a reasonable basis for the spot zoning in this instance.").

A. Benefits vs. Detriments

Defendants first contend that the rezoning would create substantial benefits for the community. Our Supreme Court has stated that the analysis of this factor "is expressly limited to examining the ordinance's beneficial and detrimental effects on the property owner, his neighbors, and the surrounding community." *Good Neighbors*, 355 N.C. at 259, 559 S.E.2d at 772.

One example of a qualifying benefit is a showing that neighboring property values would increase as a result of the rezoning. Other benefits previously recognized by the Court, as illustrated in *Chrismon*, include: (1) a showing of broad-based support for the proposed use of the property, and (2) a showing that many of the surrounding land-owners were likely to use the expanded services offered by the property owner seeking the zoning change.

Id. at 259-60, 559 S.E.2d at 772.

In the instant case, defendants argue that the rezoning will be beneficial because the proposed recycling center would (1) create three to four jobs; (2) allow for dilapidated structures on the property to be rehabilitated; (3) allow county citizens to dispose of their unwanted metals; and (4) make use of a railroad siding. In addition, defendants note that Commissioner J. Owen Etheridge ("Commissioner Etheridge") stated that he witnessed support for the rezoning from twenty-eight of thirty-three attendees at a preliminary community meeting regarding Cartwright's application.

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Many of the benefits from the rezoning proposed by defendants are not supported by any evidence presented at the public hearing. For instance, there was no evidence presented that the surrounding community would be particularly likely to use the recycling center or that there was a specific need for a recycling center in the property's location. In *Mahaffey v. Forsyth County*, this Court held that a spot zoning to facilitate the establishment of an automobile parts store could not be said to benefit the community because "auto parts are a common and easily obtainable product and, if such a retail establishment were said to be 'beneficial to a rural community,' then virtually any type of business could be similarly classified." 99 N.C. App. 676, 683, 394 S.E.2d 203, 208 (1990), *aff'd per curiam*, 328 N.C. 323, 401 S.E.2d 365 (1991). The recycling center in the instant case likewise provides only a generalized benefit that has no specific connection to the surrounding rural community.

Commissioner Etheridge's statement that he personally witnessed significant support for the rezoning at a preliminary public hearing is also not supported by any evidence in the record. Moreover, even assuming, *arguendo*, that the statement was accurate, it still fails to establish that there was substantial community support for the rezoning. Commissioner Etheridge's statement acknowledges that multiple individuals were opposed to the rezoning at the meeting he attended, and at the actual public meeting where the rezoning was considered, the vast majority of individuals who addressed the rezoning spoke in opposition to it. Thus, there was not the type of overwhelming public support for the rezoning that would be necessary to establish that the rezoning was beneficial to the surrounding community. *Cf. Chrismon*, 322 N.C. at 630, 370 S.E.2d at 590 (benefit of spot zoning demonstrated when eighty-eight local residents signed a petition supporting the rezoning, multiple members of the community spoke in favor of the rezoning, and only one property owner spoke in opposition to it).

In addition, two real estate professionals who spoke at the hearing stated that they believed that the proposed recycling center would decrease property values both in the immediate vicinity of the property and in the Shawboro community as a whole. There was no evidence to the contrary presented during the meeting. Finally, both Currituck County Sheriff Susan Johnson ("Sheriff Johnson") and a representative from the North Carolina Department of Cultural Resources ("the DCR") submitted letters to the Board expressing their concerns with the rezoning. Sheriff Johnson was concerned because businesses similar to the proposed recycling center had experienced increases in crime and other

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suspicious activity, and the DCR was concerned that the proposed recycling center would adversely affect two nearby historic properties.

In light of this evidence, defendants have failed to make a clear showing that the benefits of the rezoning outweighed its detriments. Consequently, this factor also weighs against the reasonableness of the rezoning.

B. Relationship of Uses

Defendants next argue that the proposed uses under the rezoning would be consistent with the uses allowed or occurring on adjacent properties. The *Chrismon* Court stated the following regarding this factor:

In determining whether a zoning amendment constitutes spot zoning, the courts will consider the character of the area which surrounds the parcel reclassified by the amendment. *Most likely to be found invalid is an amendment which reclassifies land in a manner inconsistent with the surrounding neighborhood.*

1 R. Anderson, *American Law of Zoning* § 5.16 at 383 (3d ed. 1986) (emphasis added). One court has described the evil to be avoided as “an attempt to *wrench* a single small lot from its environment and give it a new rating *which disturbs the tenor of the neighborhood.*” *Magnin v. Zoning Commission*, 145 Conn. 26, 28, 138 A. 2d 522, 523 (1958) (emphasis added).

Chrismon, 322 N.C. at 631, 370 S.E.2d at 591. The Court went on to note that “significant disturbances such as the rezoning of a parcel in an old and well-established residential district to a commercial or industrial district would clearly be objectionable” under this factor. *Id.* In *Budd v. Davie County*, this Court cited this language in concluding that a spot rezoning from residential-agricultural to industrial to permit the installation of a sand dredging operation “would destroy the tenor of the quiet residential and agricultural neighborhood.” 116 N.C. App. 168, 178, 447 S.E.2d 449, 455 (1994). Similarly, in *Good Neighbors*, our Supreme Court held that a spot rezoning to permit chemical storage in an area “specifically zoned for farms and residences” was unreasonable under this factor. 355 N.C. App. at 262, 559 S.E.2d at 773.

In the instant case, the property was rezoned from agricultural, which is the least intense residential district under the UDO, to heavy

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manufacturing, which was the most intense industrial district. Thus, like the spot zonings found to be unreasonable in *Budd* and *Good Neighbors*, the rezoning in this case impermissibly “wrench[es] a single small lot from its environment and give[s] it a new rating which disturbs the tenor of the neighborhood.” *Chrismon*, 322 N.C. at 631, 370 S.E.2d at 591 (emphasis omitted).

However, defendants contend that the rezoning should still be considered reasonable pursuant to this factor because (1) the previous use of the property, a granary, was in greater conflict with the surrounding properties than the proposed recycling center; and (2) the County may still place limitations upon the property that would bring it into harmony with the surrounding properties when Cartwright seeks a required special use permit. Defendants’ first contention is immaterial, because previous uses of the rezoned property are not considered as part of this factor. See *Good Neighbors*, 355 N.C. at 261, 559 S.E.2d at 773 (This factor consists of “evaluating the relationship between the uses envisioned under the new zoning and *the uses currently present in adjacent tracts . . .*” (emphasis added)).

In support of its second contention, defendants cite *Purser v. Mecklenburg County*, 127 N.C. App. 63, 488 S.E.2d 277 (1997). In *Purser*, the property at issue was rezoned from residential to a conditional-use district to allow for a “Neighborhood Convenience Center,” which would provide retail establishments that were consistent with the daily needs of the nearby residents. *Id.* at 65, 488 S.E.2d at 278. This Court found that under those circumstances, the “relationship of uses” factor weighed in favor of the reasonableness of the spot zoning because “the development of the Center was governed by a conditional use site plan that was designed to integrate the Center into the neighborhood and insure that it would be in harmony with the existing and proposed residential uses on the surrounding property.” *Id.* at 70-71, 488 S.E.2d at 282.

Purser is distinguishable from the instant case. Unlike in *Purser*, defendants in the instant case have presented no evidence that the recycling center has been designed to be integrated into the surrounding area. The only condition on the rezoning cited by defendants in their brief is an eight-foot fence which is to be installed around the property. However, defendants fail to adequately explain how this fence will significantly diminish the impact of the recycling center on surrounding properties. Consequently, we conclude that defendants have failed to clearly show that the proposed recycling center would be consistent with the uses of adjoining properties.

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Ultimately, defendants have failed to meet their burden to make a clear showing pursuant to any of the *Chrismon* factors that the rezoning was a reasonable spot zoning. Accordingly, the trial court properly granted summary judgment in favor of plaintiffs because the rezoning constituted illegal spot zoning. Defendants' argument is overruled.

IV. Plaintiffs' Appeal – Attorney's Fees

[3] Plaintiffs' sole argument on appeal is that the trial court erred by denying their request for attorney's fees. Specifically, plaintiffs contend that defendant's illegal spot zoning constituted an abuse of discretion and that, as a result, N.C. Gen. Stat. § 6-21.7 required the trial court to award attorney's fees as a matter of law. We disagree.

Ordinarily, the "recovery of attorney's fees, even when authorized by statute is within the trial court's discretion and will only be reviewed for an abuse of that discretion." *Martin Architectural Prods., Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). However, "[w]e review a trial court's decision whether to award mandatory attorney's fees *de novo*." *Willow Bend Homeowners Ass'n v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 578 (2008) (emphasis added).

In the instant case, plaintiffs sought to recover attorney's fees pursuant to N.C. Gen. Stat. § 6-21.7, which states:

In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs.

N.C. Gen. Stat. § 6-21.7. This statute permits a party that successfully challenges an action by a city or county to recover attorney's fees if the trial court makes certain findings of fact. When the court finds *only* that the city or county acted outside the scope of its legal authority, the award of attorney's fees is discretionary. *See Brock and Scott Holdings, Inc. v. Stone*, 203 N.C. App. 135, 137, 691 S.E.2d 37, 38 (2010) ("[T]he use of [the word] 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act."). However, if the court additionally finds that the city's or county's action constituted an abuse of discretion, then the award of attorney's fees is mandatory.

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See Internet E., Inc. v. Duro Communications, Inc., 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001) (“The word ‘shall’ is defined as ‘must’ or ‘used in laws, regulations, or directives to express what is mandatory.’”).

In the instant case, the trial court properly determined that the rezoning constituted illegal spot zoning and thus that the County acted outside the scope of its legal authority. *See Alderman v. Chatham County*, 89 N.C. App. 610, 616, 366 S.E.2d 885, 889 (1988) (“[U]nless there is a clear showing of a reasonable basis, spot zoning is beyond the authority of the county or municipality.” (internal quotations and citation omitted)). However, the court did not find that the County’s action was an abuse of discretion and instead ordered both parties to be “responsible for their own attorney’s fees and costs.” Plaintiffs argue that the trial court’s failure to award them attorney’s fees was error because (1) the County’s action was necessarily an abuse of discretion as a matter of law; or (2) in the alternative, that the record supports a determination that the County abused its discretion. Plaintiffs are mistaken.

Plaintiffs first contend that “illegal spot zoning is always outside the scope of the County’s legal authority and always an abuse of discretion and, therefore, once it is determined that illegal spot zoning occurred, the Trial Court is required to award attorney’s fees.” In support of this argument, plaintiffs rely on the principle noted in this Court’s opinion in *Summers v. City of Charlotte*, which states, in relevant part:

Local governments have been delegated the power to zone their territories and restrict them to specified purposes by the General Assembly. *Zoppi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E.2d 325, 330 (1968). This authority “is subject both to the . . . limitations imposed by the Constitution and to the limitations of the enabling statute.” *Id.* Within those limitations, the enactment of zoning legislation “is a matter within the discretion of the legislative body of the city or town.” *Id.*

149 N.C. App. 509, 517, 562 S.E.2d 18, 24 (2002). Plaintiffs contend that since local governments only have discretion to enact zoning legislation when they are acting within the limitations imposed by the Constitution and by statute, any action which exceeds those limitations must also exceed the discretionary authority of the local government such that the action constitutes an abuse of discretion as a matter of law, which in turn requires an automatic award of attorney’s fees.

Plaintiffs’ contention cannot be reconciled with the plain language of N.C. Gen. Stat. § 6-21.7. Pursuant to that statute, a “finding by the

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court that the city or county acted outside the scope of its legal authority,” such as a finding that a local government engaged in illegal spot zoning, does not, in and of itself, trigger the mandatory award of attorney’s fees. N.C. Gen. Stat. § 6-21.7. Instead, the trial court must also explicitly consider and “find[] that the city’s or county’s action was an abuse of its discretion” in order to trigger the mandatory award of fees. *Id.* Plaintiffs’ proposed interpretation of the statute would collapse these two distinct required inquiries into one, essentially deleting a portion of the statute. Such an interpretation is impermissible because our Courts “have no power to add to or subtract from the language of the statute.” *Zaldana v. Smith*, ___ N.C. App. ___, ___, 749 S.E.2d 461, 463 (2013) (internal quotation and citation omitted), *disc. rev. denied*, ___ N.C. ___, ___ S.E.2d ___ (2014).

“[A]n abuse of discretion occurs when a determination ‘is so arbitrary that it could not have been the result of a reasoned decision.’” *Bishop v. Ingles Mkts., Inc.*, ___ N.C. App. ___, ___, 756 S.E.2d 115, 121 (2014) (quoting *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 26, 514 S.E.2d 517, 520 (1999)). Contrary to plaintiffs’ argument, the language of N.C. Gen. Stat. § 6-21.7 clearly indicates that the General Assembly believed that a local government could erroneously act outside the scope of its legal authority but yet not be acting in a manner “so arbitrary that it could not have been the result of a reasoned decision.” *Id.* Thus, we conclude that under the plain language of the statute, the trial court is always required to separately determine both (1) that a local government acted outside the scope of its legal authority; and (2) that the act in question constituted an abuse of discretion before the court is required to award attorney’s fees. Plaintiffs’ proposed interpretation to the contrary must be rejected.

Nonetheless, plaintiffs still argue that “the undisputed facts of the case sub judice are particularly egregious and further demonstrate the County’s abuse of discretion in approving the rezoning.” Specifically, plaintiffs note that during the hearing which considered the rezoning request, concerns with the proposed rezoning were raised by (1) the Planning Board, because the rezoning was inconsistent with the comprehensive plan; (2) Sheriff Johnson, because the proposed use would potentially require the hiring of a new law enforcement officer; (3) the DCR, which was concerned that the proposed use would have negative effects on two nearby historic properties; and (4) nearby landowners. Plaintiffs also contend that the record reflects that the Board failed to properly consider and analyze the relevant spot zoning reasonableness factors after being informed about those factors by the County Attorney.

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Plaintiffs argue that the Board's approval of the rezoning in these circumstances irrefutably demonstrates an abuse of discretion.

However, the evidence cited by plaintiffs was not the only information before the Board. Cartwright explained the benefits that the recycling center would bring to the community and informed the Board how he expected the center would operate, including the steps he would take to limit the center's impact on nearby landowners. In addition to Cartwright, three individuals spoke in favor of the rezoning at the public hearing. Two of these individuals specifically referenced prior uses of the property and suggested that the recycling center would not impact the area surrounding the property in a materially different manner than these prior uses. The third individual supported the rezoning because he felt there was a need for industry in Currituck County.

Based upon the information presented during the hearing, Commissioner Etheridge made the following motion in favor of the rezoning:

Mr. Chairman, since I live in the Shawboro community and I will be affected by this one way or the other, I am going to make a motion to recommend approval of this. And I do so citing that it is consistent with the land use plan, and the request is reasonable and in the public interest. It also promotes orderly growth and development in our community, and it follows the long history of industrial uses that have been in this area.

One, it's a rail siding with three rail spurs, the largest one in Currituck County. It has had a cotton gin, an asphalt plant, two different fertilizer plants, agricultural chemical storage, granaries, as I said to [inaudible], lime off—they offloaded lime there. DOT has—NCDOT, DOT, has used this property to offload rail cars of highway maintenance materials. Various contracting firms have offloaded rail cars at this site. North Carolina Power has, on occasion, offloaded large electrical equipment here. So it has a history of being an industrial area, or the railroad would have never put the siding there to begin with.

So with that, and the fact that there was overwhelming support at the community meeting—I think the report was thirty-three people there, twenty-eight supported it. Here tonight it appears to be somewhat overwhelming support

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from the general community. And the general community we're talking about is Currituck and Shawboro in particular. And I look out here and I see people from Shawboro and throughout the county. And I think it is time that we take the foot of government off the throat of starting businesses in this county and we do what we can to make sure.

Now, in this additional zoning permit, I would also add that we add opaque fencing to be determined height-wise, and a special use permit that every factor that the staff and Mr. Cartwright can work on to mitigate any possible negative impacts be looked at and then addressed at the special use permit.

This statement is the only information on the record regarding the Board's reasoning for the approval of the rezoning, which occurred shortly after Commissioner Etheridge's motion was made. The motion demonstrates that the Board considered most of the *Chrismon* reasonableness factors prior to approving the rezoning. Commissioner Etheridge specifically cited his belief that the rezoning was consistent with the UDO, noted benefits to the community such as economic growth and significant community support, and discussed how the newly zoned property would be consistent with surrounding property uses, including how the recycling center's impact would be mitigated through the special use permit process. While we have determined that Commissioner Etheridge's reasoning was insufficient to meet the County's legal burden of making "a clear showing of a reasonable basis for the zoning," *Good Neighbors*, 355 N.C. at 258, 559 S.E.2d at 771, we cannot conclude that the Board's reliance on the information cited by Commissioner Etheridge was so unreasonable that the legislative act of the rezoning "could not have been the result of a reasoned decision." *Bishop*, ___ N.C. App. at ___, 756 S.E.2d at 121. Accordingly, the trial court did not err by determining that the rezoning was not an abuse of discretion by the County.¹ Since there was sufficient evidence for the trial court to decide that the rezoning was not an abuse of discretion, there was also sufficient evidence for the court, in its discretion, to deny plaintiffs' motion for attorney's fees. Thus, we conclude the trial court did not abuse its discretion by denying that motion. This argument is overruled.

1. Although the trial court did not explicitly find that the County did not abuse its discretion by enacting the rezoning, such a finding is implicit in the court's decision to have both parties bear their own costs and attorney's fees.

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V. Conclusion

The trial court properly awarded summary judgment in favor of plaintiffs for their illegal spot zoning claim because there was no genuine issue of material fact as to whether the rezoning constituted illegal spot zoning. Pursuant to N.C. Gen. Stat. § 6-21.7, if the trial court finds only that a local government acted outside the scope of its authority, the award of attorney's fees is discretionary. However, if the trial court additionally finds that the local government's action was an abuse of discretion, the award of attorney's fees becomes mandatory. Since the court properly determined that the County did not abuse its discretion when it approved the illegal spot zoning of the property, it was not required to award attorney's fees to plaintiffs. The trial court did not abuse its discretion by ordering the parties to pay their own attorney's fees and costs. The trial court's order is affirmed.

Affirmed.

Judges HUNTER, Robert C. and GEER concur.

KEEN LASSITER, AS GUARDIAN AD LITEM FOR JAKARI BAIZE, A MINOR, PLAINTIFF
v.
NORTH CAROLINA BAPTIST HOSPITALS, INCORPORATED *a/k/a* NORTH CAROLINA
BAPTIST HOSPITAL, WAKE FOREST UNIVERSITY HEALTH SCIENCES, TERRY
DANIEL, M.D. AND DAYSPRING FAMILY MEDICINE ASSOCIATES, PLLC, DEFENDANTS

No. COA14-165

Filed 5 August 2014

Costs—expert witness fees—witnesses not under subpoena

The trial court erred in a medical malpractice case by granting expert witness fees as costs to defendants pursuant to N.C.G.S. § 7A-305 when the witnesses were not under subpoena.

Appeal by plaintiff from orders entered 9 September 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 21 May 2014.

Pulley, Watson, King & Lischer, P.A., by Charles F. Carpenter and Tracy K. Lischer; and Edwards & Edwards, L.L.P., by Joseph T. Edwards and Sharron R. Edwards, for plaintiff-appellant.

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Wilson Helms & Cartledge, LLP, by G. Gray Wilson and Linda L. Helms, for defendant-appellees North Carolina Baptist Hospitals, Incorporated a/k/a North Carolina Baptist Hospital and Wake Forest University Health Sciences.

Carruthers & Roth, P.A., by Richard L. Vanore, Norman F. Klick, Jr., and Robert N. Young, for defendant-appellees Terry Daniel, M.D. and Dayspring Family Medicine Associates, PLLC.

McCULLOUGH, Judge.

Plaintiff Keen Lassiter as *guardian ad litem* for Jakari Baize appeals an order granting expert witness fees as costs to defendants Terry Daniel, M.D., and Dayspring Family Medicine Associates, PLLC, pursuant to section 7A-305 of the North Carolina General Statutes. Based on the reasons stated herein, we reverse and remand the orders of the trial court.

I. Background

On 8 December 2010, Chinatha Clark as *guardian ad litem* for Jakari Baize filed a complaint against defendants North Carolina Baptist Hospitals, Incorporated a/k/a North Carolina Baptist Hospital, Wake Forest University Health Sciences (collectively “defendants Baptist and Wake Forest”), Terry Daniel, M.D., and Dayspring Family Medicine Associates, PLLC (collectively “defendants Daniel and Dayspring”) for medical malpractice.

In February of 2011, defendants filed motions for the court to schedule a discovery conference.

On 6 July 2012, plaintiff Keen Lassiter as *guardian ad litem* for Jakari Baize filed an “Amended Designation of Expert Witnesses.”

Following a hearing held on 13 January 2012, the trial court entered a “Discovery Scheduling Order” (“DSO”). The DSO was amended by order entered 4 February 2013. Plaintiff was ordered to designate, on or before 1 May 2012, all expert witnesses intended to be called at trial. The trial court also stated that “[p]laintiff shall make [his] expert witnesses available for deposition upon request by any party on or before November 15, 2012.”

Prior to the 15 November 2012 deadline, the following witnesses were deposed by defendants: Kitty B. Carter-Wicker, M.D. on 27 July

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2012; Thomas Hegyi, M.D. on 3 August 2012; Richard Inwood, M.D. on 22 August 2012; Marcus C. Hermansen, and M.D. on 25 September 2012.

On 20 December 2012, plaintiff filed a “Motion to Amend Discovery Scheduling Order” seeking an extension of the deadline to depose his expert witnesses.

On 27 December 2012, defendants filed a “Motion to Strike and Exclude Certain Expert Witnesses Designated by Plaintiff,” arguing that plaintiff had failed to comply with the provisions of the DSO. Defendants argued that plaintiff failed to provide dates, prior to the 15 November 2012 deadline, for the depositions of the following expert witnesses: Richard C. Lussky, M.D.; J.C. Poindexter, Ph.D.; Lois Johnson, M.D.; Ann T. Neulicht, M.D.; and Steven Shapiro, M.D. Defendants asserted that they would be prejudiced if the aforementioned expert witnesses were not stricken and precluded from testifying at trial.

Following a hearing held at the 14 January 2013 term of Johnston County Superior Court, the trial court entered an order, denying plaintiff’s motion to amend the DSO and granting, in part, defendants’ motion to strike and exclude certain expert witnesses. Dr. Lussky, Dr. Poindexter, and Dr. Neulicht were excluded from testifying as experts; Dr. Shapiro was only allowed to testify as a treating physician and not as an expert; and Dr. Johnson was to be made available for deposition no later than 1 March 2013.

On 22 July 2013, plaintiff filed a “Notice of Voluntary Dismissal Without Prejudice” of all claims against all defendants.

On 2 August 2013, defendants Daniel and Dayspring filed a motion to tax costs against plaintiff pursuant to section 41(d)¹ of the North Carolina Rules of Civil Procedure and sections 7A-305 and 6-20 of the North Carolina General Statutes. Defendants Daniel and Dayspring alleged that they had “incurred reasonable and necessary expenses for stenographic and videographic services, the cost of deposition transcripts, travel expenses of defense counsel for depositions and expert witness fees for the depositions of plaintiffs’ expert witnesses in the total amount of \$39,749.60[.]”

1. N.C. Gen. Stat. § 1A-1, Rule 41 (2013), entitled “Voluntary dismissal; effect thereof,” provides in subsection (d) the following: “Costs. – A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis.”

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Also on 2 August 2013, defendants Baptist and Wake Forest filed a motion to tax costs against plaintiff pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure. Defendants Baptists and Wake Forest alleged that they had incurred “reasonable and necessary costs in the amount of \$29,609.80” in the preparation and defense of plaintiff’s action.

Following a hearing held at the 26 August 2013 civil session of Johnston County Superior Court, the trial court entered orders taxing certain costs against plaintiff on 9 September 2013. The trial court denied expenses incurred by defendants for video conferencing, stenographic preparation of a deposition summary, and room rent which were found to be “not reasonable and necessary.” However, the trial court held as follows:

[defendants] incurred expenses recoverable under North Carolina General Statute § 7A-305 for stenographic and videographic services and expert witness fees for depositions of expert witnesses taken pursuant to the provisions of the [DSO] entered in this action which the Court concludes did not need to be subpoenaed in light of the language of the [DSO] and that those expenses set forth below were, in the Court’s discretion, reasonable and necessary[.]

The trial court ordered \$23,799.61 to be taxed as costs against plaintiff to be paid to defendants Baptist and Wake Forest and \$24,738.76 to be taxed as costs against plaintiff to be paid to defendants Daniel and Dayspring.

On 30 September 2013, plaintiff entered notice of appeal from these two orders.

II. Standard of Review

“Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion.” *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011) (citations omitted).

III. Discussion

The sole issue on appeal is whether the trial court erred by granting expert witness fees as costs to defendants pursuant to section 7A-305 of the North Carolina General Statutes.

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Pursuant to N.C. Gen. Stat. § 6-20,

[i]n actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are *subject to the limitations* on assessable or recoverable costs *set forth in G.S. 7A-305(d)*, unless specifically provided for otherwise in the General Statutes.

N.C. Gen. Stat. § 6-20 (2013) (emphasis added). N.C. Gen. Stat. § 7A-305(d)(11) grants the trial court explicit statutory authority, to award as discretionary costs, “[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.” N.C. Gen. Stat. § 7A-305(d)(11) (2013). In addition, N.C. Gen. Stat. § 7A-314 provides, *inter alia*, that

- (a) A witness under subpoena . . . shall be entitled to receive five dollars (\$ 5.00) per day, or fraction thereof, during his attendance[.]
- (b) A witness entitled to the fee set forth in subsection (a) of this section . . . shall be entitled to receive reimbursement for travel expenses
-
- (d) An expert witness . . . shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. . . .

N.C. Gen. Stat. § 7A-314(a), (b), and (d) (2013). “In sum, before a trial court may assess expert witness testimony fees as costs, the testimony must be (1) reasonable, (2) necessary, and (3) given while under subpoena.” *Peters*, 210 N.C. App. at 26, 707 S.E.2d at 741.

Both plaintiffs and defendants agree that N.C. Gen. Stat. § 7A-305, read in conjunction with N.C. Gen. Stat. § 7A-314, limits the trial court’s power to award expert fees as costs only when the expert is under subpoena. However, plaintiff argues that because none of the expert witnesses were subpoenaed, the DSO did not modify or waive the requirement of a subpoena, and the parties did not waive the subpoena requirement, the trial court erred by granting expert witness fees. On the other hand, defendants contend that the DSO eliminated the need to subpoena expert witnesses for deposition.

Both plaintiff and defendants cite to our holding in *Jarrell v. The Charlotte-Mecklenburg Hospital Authority*, 206 N.C. App. 559, 698 S.E.2d

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190 (2010), in furtherance of their respective arguments. In *Jarrell*, the plaintiffs challenged an order granting the defendants' motion for costs, "specifically disputing that portion totaling \$5,715.40 in costs associated with out-of-state expert witnesses." *Id.* at 560, 698 S.E.2d at 191. Two expert witnesses were served with subpoenas to testify, but the plaintiffs argued that the out-of-state expert witnesses appearances at trial were not subject to subpoena because the subpoenas served upon them were ineffective to compel their attendance. *Id.* at 564, 698 S.E.2d at 193. The defendants argued that their discovery scheduling order "expressly waived the statutory requirement that expert witnesses must testify pursuant to subpoena before the prevailing party may recover expert fees." *Id.* at 561, 698 S.E.2d at 191-92. Our Court reviewed the language of the *Jarrell* discovery scheduling order and directed our attention to a paragraph that stated that "[a]ll parties agree that experts need not be issued a subpoena either for deposition or for trial and waive that requirement of the statute as it may affect the recovery of costs." *Id.* at 561, 698 S.E.2d at 192.

In *Jarrell*, our Court reiterated the following:

[w]here § 7A-314 specifically authorizes the court to tax expert witness fees as costs, only "witness[es] under subpoena, bound over, or recognized" are included. Read *in pari materia*, with specific statutes prevailing over general ones, § 7A-314 limits the trial court's broader discretionary power under § 7A-305(d)(11) to award expert fees as costs only when the expert is under subpoena.

Id. at 563, 698 S.E.2d at 193.

Although our Court agreed with the defendants that the "the express terms of the DSO would [have] render[ed] inapplicable the statutory provisions detailing recovery of expert witness costs," it did not consider the substance of the defendants' argument for failure to raise it at the trial level. *Id.* at 561-62, 698 S.E.2d at 192. Our Court ultimately ruled that the plaintiffs lacked standing to challenge the validity of the subpoenas served on the non-party expert witnesses. *Id.* at 560, 698 S.E.2d at 191. In addition, our Court held that because the "[p]laintiffs are not entitled to argue that [the expert witnesses'] appearance was voluntary in fact, [the] [d]efendants have met not only the requirements of § 7A-305(d)(11) but have also overcome the hurdle imposed by § 7A-314 'that the cost of an expert witness cannot be taxed unless the witness has been subpoenaed.'" *Id.* at 565, 698 S.E.2d at 194.

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Based on a thorough review, we hold that the facts of *Jarrell* are distinguishable from the case *sub judice*. In *Jarrell*, the expert witnesses were subpoenaed while the expert witnesses at issue here were never issued a subpoena. Another important distinguishing factor is that the discovery scheduling order language in *Jarrell* was explicit in terms of waiving the requirement of issuing an expert witness a subpoena in order to recover costs. Here, the DSO language merely provided that “[p]laintiff shall make [his] expert witnesses available for deposition upon request by any party on or before November 15, 2012.” There was no mention by the parties that the expert witnesses at issue did not need to be issued subpoenas for deposition or for trial and we do not interpret this DSO language as a waiver of the statutory requirements detailing recovery of expert witness costs. Based on the foregoing, we hold that the trial court erred by awarding costs for expert witnesses when the witnesses were not under subpoena. *See Stark v. Ford Motor Co.*, __ N.C. App. __, __, 739 S.E.2d 172, 176 (2013) (citing *Jarrell*, Ford Motor Company conceded and our Court agreed that the trial court erred in awarding fees for expert witnesses incurred while the expert witnesses were not under subpoena).

IV. Conclusion

We reverse the trial court’s 9 September 2013 orders to the extent it awarded costs for expert witnesses when the witnesses were not under subpoena. We also remand to the trial court for a determination of an award of costs consistent with this opinion.

Reversed and remanded.

Judges STEPHENS and STROUD concur.

SALVIE v. MED. CTR. PHARMACY OF CONCORD, INC.

[235 N.C. App. 489 (2014)]

JOHN SALVIE, EMPLOYEE, PLAINTIFF

v.

MEDICAL CENTER PHARMACY OF CONCORD, INC., EMPLOYER, AIMCO MUTUAL
INSURANCE COMPANY, CARRIER; AND/OR ACTION DEVELOPMENT COMPANY, LLC,
ALLEGED EMPLOYER, NONINSURED, AND MITCHELL W. WATTS,
INDIVIDUALLY, DEFENDANTS

No. COA13-1279

Filed 5 August 2014

1. Workers' Compensation—jurisdiction—dispute over who must pay plaintiff's claim

The Industrial Commission did not err in a workers' compensation case by determining that it lacked jurisdiction over a dispute between an insurer and its insured regarding premium fraud. Plaintiff's right to workers' compensation benefits and the amount of benefits to which he was entitled had already been decided and the dispute was over who must pay plaintiff's claim.

2. Appeal and Error—interlocutory orders and appeals—attorney fees award—Industrial Commission—amount of award not yet determined

The Court of Appeals lacked jurisdiction to hear appellant insurance company's argument that the Industrial Commission erred in its determination that an award of attorney fees was appropriate. The Commission had not yet determined the specific amount to be awarded and the Court will not consider an appeal of an attorney fees award until the specific amount of the award has been determined by the trial tribunal.

Appeal by defendant AIMCO Mutual Insurance Company from Opinion and Award entered 9 August 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 March 2014.

Prather Law Firm, P.C., by J.D. Prather, for defendant-appellant.

Smith Law Firm, P.C., by John Brem Smith, for defendants-appellees Medical Center Pharmacy, LLC and Action Development Company, LLC.

DAVIS, Judge.

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[235 N.C. App. 489 (2014)]

AIMCO Mutual Insurance Company (“AIMCO”) appeals from the Opinion and Award of the North Carolina Industrial Commission dismissing its claims and awarding Action Development Company, LLC (“Action Development”) and Mitchell Watts (“Mr. Watts”) attorneys’ fees. On appeal, AIMCO contends that the Commission erred in (1) concluding that it lacked jurisdiction over AIMCO’s claims; and (2) awarding attorneys’ fees to Action Development and Mr. Watts pursuant to N.C. Gen. Stat. § 97-88.1. After careful review, we affirm in part and dismiss the appeal in part.

Factual Background

On 20 January 2004, John Salvie (“Plaintiff”) suffered a compensable injury by accident to his back while delivering medical equipment. Medical Center Pharmacy of Concord, Inc. (“Medical Center Pharmacy”) filed a Form 60 admitting Plaintiff’s right to compensation and paid temporary total disability benefits to him. Plaintiff subsequently settled his claim with AIMCO, Medical Center Pharmacy’s insurance carrier, in an Agreement of Final Settlement and Release on 5 January 2011. The Industrial Commission approved the settlement by order filed 31 January 2012. Plaintiff’s right to workers’ compensation benefits is not at issue in this case, and he is not a party to this appeal.

AIMCO initiated the present action in the Industrial Commission by filing a Form 33 request for a hearing on whether AIMCO’s admission of liability for Plaintiff’s workers’ compensation benefits had been caused by either (1) mutual mistake of the parties; or (2) fraud or misrepresentation on the part of Medical Center Pharmacy or its owner, Mr. Watts. AIMCO also sought a determination as to whether Plaintiff was a joint or lent employee of Action Development¹ or of Mr. Watts individually. AIMCO alleged that because Plaintiff performed most of his work for Action Development and was jointly employed by Action Development and Medical Center Pharmacy at the time of his injury, Action Development was “jointly liable for the workers’ compensation benefits paid [to Plaintiff] under the legal theory of ‘lent’ employment.”

The matter came on for hearing on 25 June 2012 before Deputy Commissioner Adrian Phillips. Deputy Commissioner Phillips filed an opinion and award on 17 January 2013 concluding that (1) the Commission lacked jurisdiction “over what is now a dispute between an insurer, AIMCO, and its insured regarding premium fraud”; (2) Action

1. Action Development is a real estate holding company and — like Medical Center Pharmacy — is owned by Mr. Watts.

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Development was not subject to the Workers' Compensation Act because it did not employ the requisite number of employees; and (3) Action Development and Mr. Watts were entitled to attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1. AIMCO appealed to the Full Commission, and on 9 August 2013, the Commission entered its Opinion and Award affirming Deputy Commissioner Phillips' decision. AIMCO gave timely notice of appeal to this Court.

Analysis**I. Jurisdiction of the Industrial Commission**

[1] AIMCO argues that the Industrial Commission erred in determining that it lacked jurisdiction over AIMCO's claims against Action Development and Mr. Watts. We disagree.

The Industrial Commission is not a court of general jurisdiction. Rather, it is a quasi-judicial administrative board created to administer the Workers' Compensation Act and has no authority beyond that conferred upon it by statute. *Cornell v. W. & S. Life Ins. Co.*, 162 N.C. App. 106, 108, 590 S.E.2d 294, 296 (2004). The Workers' Compensation Act specifically "relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising out of and in the course of the employment relation. Where that relation does not exist the Act has no application." *Bryant v. Dougherty*, 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966).

When reviewing an Opinion and Award, the jurisdictional facts found by the Commission are not conclusive even if there is evidence in the record to support such findings. *Terrell v. Terminix Servs., Inc.*, 142 N.C. App. 305, 307, 542 S.E.2d 332, 334 (2001). Instead, "reviewing courts are obliged to make independent findings of jurisdictional facts based upon consideration of the entire record." *Id.*

Here, it is undisputed that — as the Commission determined in finding of fact 26 — "Plaintiff does not have a stake in the current case." Therefore, because AIMCO's claim does not implicate the rights of Plaintiff (the injured employee) and instead merely seeks a determination of whether Action Development or Mr. Watts should be required to reimburse AIMCO for some portion of the benefits already paid to Plaintiff, we affirm the Commission's determination that it lacked jurisdiction over the matter.

In so holding, we are guided by our Supreme Court's decision in *Clark v. Gastonia Ice Cream Co.*, 261 N.C. 234, 134 S.E.2d 354 (1964). In *Clark*, an employee filed a workers' compensation claim against his

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employer, Gastonia Ice Cream Company (“the Company”), claiming that he had suffered a compensable injury by accident on 3 May 1960. *Id.* at 234, 134 S.E.2d at 355. The Company asserted that on the date of the employee’s injury it was covered by an insurance policy issued by Lumbermens Mutual Casualty Company (“Lumbermens”) and moved for Lumbermens to be made a party to the proceeding. *Id.* at 234-35, 134 S.E.2d at 355-56. The Company introduced evidence at the hearing before the deputy commissioner tending to show that Lumbermens had agreed to issue a policy beginning 20 April 1960 despite the fact that the written policy stated that the policy period was from 9 May 1960 to 1 June 1961. *Id.* at 237, 134 S.E.2d at 357-58. After concluding that the employee had suffered a compensable injury, the Commission determined that it possessed jurisdiction to determine the respective liabilities of the Company and Lumbermens and concluded that the Company was not covered by the policy on the date the employee’s injury occurred. *Id.* at 237, 134 S.E.2d at 357.

Our Supreme Court held that the Commission lacked jurisdiction to determine the rights and liabilities between the Company and Lumbermens and set aside the Commission’s findings and conclusions on that issue. *Id.* The Court explained that the Commission is an administrative board with “limited jurisdiction created by statute and confined to its terms,” and consequently, whether the Commission had jurisdiction over the Company’s action to recover from Lumbermens the payments it was required to make to the employee “depend[ed] solely upon whether such jurisdiction was conferred by statute.” *Id.* at 238, 134 S.E.2d at 358 (citation and quotation marks omitted).

The Supreme Court then determined that N.C. Gen. Stat. § 97-91 — which gives the Commission jurisdiction to decide questions arising under the Workers’ Compensation Act — did not confer upon the Commission jurisdiction over an indemnity dispute that was not germane to the employee’s right to compensation. The Court reasoned that questions arising under the Act “would seem to consist primarily, if not exclusively, of questions for decision in the determination of rights asserted by or on behalf of an injured employee or his dependents.” *Id.* at 240-41, 134 S.E.2d at 360. The Court explained that, as a general rule,

when it is ancillary to the determination of the employee’s rights, the . . . [C]ommission has authority to pass upon a question relating to the insurance policy, including fraud in procurement, mistake of the parties, reformation of the policy, cancellation, and construction of extent of coverage. . . . On the other hand, when the rights of the employee

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in a pending claim are not at stake, many commissions disavow jurisdiction and send the parties to the courts for relief. This may occur when the question is purely one between two insurers, one of whom alleges that he has been made to pay an undue share of an award to a claimant, the award itself not being under attack. Or it may occur when the insured and insurer have some dispute entirely between themselves about the validity or coverage of the policy or the sharing of the admitted liability.

Id. at 239-40, 134 S.E.2d at 359 (citation and quotation marks omitted). The Supreme Court concluded that the Workers' Compensation Act neither expressly nor impliedly gives the Commission jurisdiction to decide matters that are purely between an employer and its insurer and that do not impact the rights of the injured employee. *Id.* at 240, 134 S.E.2d at 359.

This principle was further applied in *TIG Ins. Co. v. Deaton, Inc.*, 932 F.Supp. 132 (W.D.N.C. 1996).² In that case, TIG Insurance Company ("TIG"), one of the insurance carriers for an injured employee's employer, filed an action against the employer seeking the recovery of benefits that TIG had paid to the injured employee. *Id.* at 135. The employer moved to dismiss the claim, arguing that the North Carolina Industrial Commission had exclusive jurisdiction to hear the case. *Id.* at 136. Citing *Clark*, the federal district court rejected the employer's argument, stating that

[i]n the case at bar, the dispute is essentially over who must pay [the employee's] claim, not whether or how much [the employee] will be paid. Therefore, this dispute is not "ancillary to the determination of the employee's right" but wholly distinct from it. There is no indication in the record that a decision in this case will in any way effect whether or how much [the employee] will receive on his claim. Thus it appears to this Court that, under the previous rulings of the North Carolina Supreme Court, the Industrial Commission does not have any jurisdiction to hear this case, let alone exclusive jurisdiction.

Id. at 137.

2. "With regard to matters of North Carolina state law, neither this Court nor our Supreme Court is bound by the decisions of federal courts, including the Supreme Court of the United States, although in our discretion we may conclude that the reasoning of such decisions is persuasive." *Davis v. Urquiza*, ___ N.C. App. ___, ___, n. 1, 757 S.E.2d 327, 331, n. 1 (2014) (citation and quotation marks omitted).

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We find the reasoning in *TIG* persuasive and a correct application of our Supreme Court's decision in *Clark*. As in *TIG*, the insurance provider here, AIMCO, is seeking the reimbursement of benefits that it paid to an injured employee, Plaintiff. Plaintiff's right to workers' compensation benefits (and the amount of benefits to which he is entitled) has already been decided and the dispute now is "over who must pay [Plaintiff's] claim." *Id.* As such, we hold that the Commission properly concluded that it did not possess jurisdiction over this dispute.³

II. Attorneys' Fees

[2] AIMCO next argues that the Commission erred in concluding that it brought the present claim without reasonable grounds in violation of N.C. Gen. Stat. § 97-88.1 such that Action Development and Mr. Watts were entitled to the recovery of attorneys' fees. However, although the Commission concluded that an award of attorneys' fees was appropriate, it has not yet ordered the specific amount to be awarded. In its Opinion and Award, the Commission stated as follows:

AIMCO Mutual Insurance Company shall pay attorney's fees to counsel for Action Development Company, LLC and Mitchell Watts. Counsel for Action Development Company, LLC and Mitchell Watts shall submit to the Full Commission an Affidavit and itemized statement of time expended defending AIMCO's claim for assessment of a reasonable attorney's fee.

Consequently, this portion of the appeal is interlocutory. *See Medlin v. N.C. Specialty Hosp., LLC*, ___ N.C. App. ___, ___, 756 S.E.2d 812, 821 (2014) (dismissing portion of appeal concerning award of attorneys' fees as interlocutory where trial court reserved ruling on amount of award and appellant failed to argue that award of attorneys' fees affected substantial right).

We note that the unresolved issue of the specific amount of attorneys' fees to be awarded does not render AIMCO's *entire* appeal interlocutory. *See Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013) (holding that order may be final for purposes of appeal "even when the trial court reserves for later determination collateral issues such as attorney's fees and costs"). However, we have previously held

3. Because we conclude that the Commission lacked jurisdiction based on the fact that Plaintiff's rights under the Workers' Compensation Act were not at stake, we do not reach the issue of whether Action Development employed the requisite number of employees to be subject to the Act.

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that this Court will not consider an appeal of an attorneys' fees award until the specific amount of the award has been determined by the trial tribunal. See *Triad Women's Center, P.A. v. Rogers*, 207 N.C. App. 353, 358, 699 S.E.2d 657, 660 (2010) ("[A]n appeal from an award of attorneys' fees may not be brought until the trial court has finally determined the amount to be awarded."). Otherwise, as we explained in *Triad*,

we would be required to visit the attorneys' fees issue twice: one appeal addressing, in the abstract, whether [the party] may recover attorneys' fees at all and, if we upheld the first order, a second appeal addressing the appropriateness of the actual monetary award.

Id. Accordingly, while we possess jurisdiction over the first issue raised by AIMCO in this appeal, we must dismiss for lack of appellate jurisdiction the portion of AIMCO's appeal challenging the Industrial Commission's determination that an award of attorney's fees was appropriate. *Id.*

Conclusion

For the reasons stated above, we (1) affirm the Industrial Commission's Opinion and Award concluding that it lacked jurisdiction over AIMCO's claims; and (2) dismiss the portion of AIMCO's appeal challenging the Commission's conclusion that Action Development and Mr. Watts were entitled to recover attorneys' fees.

AFFIRMED IN PART; DISMISSED IN PART.

Judges CALABRIA and STROUD concur.

STATE v. BERRY

[235 N.C. App. 496 (2014)]

STATE OF NORTH CAROLINA

v.

EDDIE DANIEL BERRY

No. COA13-953

Filed 5 August 2014

1. Evidence—redacted report—stipulation—jury instruction—not an expression of opinion—not prejudicial

The trial court did not err in a sexual offenses case by instructing the jury to accept as true a redacted interview report by a licensed social worker that was entered into evidence by the State. The trial court did not express an opinion in its limiting instruction to the jury, and taken as a whole, the instructions did not prejudice defendant.

2. Evidence—stipulation—plain error not applicable

The trial court did not commit plain error in a sexual offenses case by admitting a licensed clinical social worker's redacted report into evidence. Defendant stipulated to the admission of the report at trial and agreed to the language of the stipulation and limiting instruction. The concept of plain error is not applicable to stipulations entered into at trial.

3. Constitutional Law—effective assistance of counsel—stipulation to report—trial strategy

Defendant did not receive ineffective assistance of counsel in a sexual offenses case when his trial attorney stipulated to the admission of a licensed clinical social worker's redacted report and failed to object to the trial court's instruction regarding the report. The record did not provide sufficient information to determine whether trial counsel's decision to agree to the stipulation of the report was the result of a legitimate trial strategy.

Judge HUNTER, Robert C. concurs in part and dissents in part.

Appeal by defendant from judgment entered 28 February 2013 by Judge James E. Hardin Jr. in Alamance County Superior Court. Heard in the Court of Appeals 8 April 2014.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

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Appellate Defender Staples Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

STEELMAN, Judge.

In accepting a stipulation of the parties and giving an instruction to the jury on how to consider the stipulation, the trial court did not express an opinion on a question of fact to be decided by the jury in violation of N.C. Gen. Stat. § 15A-1222 or express an opinion as to whether a fact had been proved in violation of N.C. Gen. Stat. § 15A-1232. Plain error review is not applicable to appellate review of a stipulation entered into by defendant at trial. The record does not provide sufficient information for this court to rule on defendant's ineffective assistance of counsel claim, and that claim is dismissed without prejudice to defendant raising the claim in a motion for appropriate relief filed by the trial court.

I. Factual and Procedural Background

Eddie D. Berry (defendant) met Annalean Rogers (Annalean) in June of 2000. Shortly thereafter he moved into the apartment she shared with her four children: daughters A.R. and B.R. and sons C.R. and D.R. Defendant married Annalean on 5 July 2004 and assumed the role of stepfather to A.R. and her siblings.

At the time of the trial, A.R. was eighteen years old. A.R. testified that defendant sexually assaulted her for the first time a couple of weeks before defendant and Annalean got married. A.R. testified that the sexual assaults continued for several years. The final incident occurred on 4 July 2009. After this incident, A.R. called her uncle, Roy Rogers (Roy), and told him what had happened. A.R. called the police and gave a statement to Officer Robert Lovette (Officer Lovette) of the Graham Police Department. On 15 February 2010, defendant was indicted for taking indecent liberties with a child. A superseding indictment was issued on 26 November 2012 charging defendant with one count of indecent liberties with a child and one count of statutory rape.

At trial, by stipulation of the parties, the State entered into evidence a redacted interview report by Janet Hadler (Hadler), a clinical social worker who interviewed A.R. Her report contained some statements that contradicted A.R.'s trial testimony. The report also contained the following:

TSCC: This report should be used as only one source of information about the individual being evaluated. In this

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respect, no decisions should be based solely on the information contained in this report. The raw and standardized scores contained in this report should be integrated with other sources of information when making decisions about this individual. [A.R.]’s TSCC is considered to be valid. . . . [A.R.]’s scores were in the clinically significant range for the following TSCC Clinical Scales/Subscales: Anxiety (T-score 67), . . . Fantasy (T-score 68), Sexual Concerns (T-score 120), Sexual Preoccupation (T-score 105), and Sexual Distress (T-score 133.) According to the manual, T-scores at or above 65 are considered clinically significant. For the SC (sexual concerns) scale and it’s [sic] subscales SC-P and SC-D, T-scores at or above 70 are considered clinically significant. The manual states, “children with especially elevated scores on the SC scale may have been prematurely sexualized or sexually traumatized. This can occur as a result of childhood sexual abuse, [sic] exposure to pornography, witnessing sexual acts, or, in the case of adolescents, sexual assault by a peer.”

Hadler was unable to testify at trial due to a family illness. The parties stipulated that redacted portions of Hadler’s report be received as evidence for the purpose of corroborating A.R.’s testimony. The stipulation read as follows:

Janet Hadler, licensed clinical social worker, performed a child family evaluation of [A.R.] in September and October of 2009. Ms. Hadler is unavailable due to family illness. The parties have stipulated that the portion of her report of her interview with [A.R.] may be entered into evidence without her presence. This evidence may be considered for the purpose of corroboration of the witness, [A.R.].

During a conference with counsel outside of the presence of the jury, the trial judge indicated that he would allow the report to be entered into evidence as State’s Exhibit 6 pursuant to the agreed upon stipulation, which would be marked as State’s Exhibit 7. The trial judge further indicated that:

I’ll then give a limiting instruction that is consistent with pattern instruction 101.41 out of the civil pattern instructions regarding stipulations which will essentially say that the State of North Carolina and the defendant have agreed or stipulated that certain facts shall be accepted by you

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[members of the jury] as true without further proof. Those facts have been stated in the record as it relates to stipulation as described in State's Exhibit 7 since the parties have so agreed. You will take these facts as true for the purpose of this case.

The State's attorney and defendant's trial counsel assented to this instruction, and made no objection.

In the presence of the jury, the State's attorney read the agreed-upon stipulation to the jury and moved, without objection, to enter State's Exhibits 6 and 7 into evidence. The State's attorney then moved to publish copies of Hadler's redacted report to the jury. The trial judge, before allowing the redacted report to be published to the jury, instructed the jury as follows:

Now, before we proceed, ladies and gentlemen, I want to make sure that you understand that the State of North Carolina and the defendant have agreed or stipulated that certain facts shall be accepted by you as true without further proof.

The agreed facts in this case relate to what is marked as State's Exhibit 7 and now received as a stipulation and State's Exhibit 6, portions of an interview conducted by the relevant parties as described.

Since the parties have so agreed, you are to take these facts as true for the purposes of this case.

On 26 February 2013, the jury returned guilty verdicts against defendant for one count of taking indecent liberties with a minor and one count of statutory rape; he was sentenced to 336 to 415 months active imprisonment.

Defendant appeals.

II. Stipulation and Limiting Instruction

[1] In his first argument, defendant contends that the trial court erred by instructing the jury to accept as true a redacted interview report by a licensed social worker that was entered into evidence by the State. We disagree.

A. Standard of Review

A trial judge's expression of opinion on a question of fact violates the statutory mandates of N.C. Gen. Stat. §§ 15A-1222 and 1232, and

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therefore is preserved for *de novo* appellate review as a matter of law. See *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989).

B. Analysis

The parties advised the trial judge that they had agreed to the following stipulation:

Janet Hadler, a licensed clinical social worker, performed a child family evaluation of [A.R.] in September and October of 2009. Ms. Hadler is unavailable due to family illness. The parties have stipulated that a portion of her report of her interview with [A.R.] may be entered into evidence without her presence. This evidence may be considered for the purpose of corroboration of the witness, [A.R.]

This stipulation was read verbatim to the jury by Mr. Thompson, the Assistant District Attorney prosecuting the case. Mr. Thompson then clarified, “That stipulation, Your Honor, is State’s Exhibit 7. The actual portion of the evidence we’re introducing is State’s Exhibit 6.” Judge Hardin then gave a limiting instruction to the jury which stated that, “The agreed facts in this case relate to what is marked as State’s Exhibit 7 and now received as a stipulation and State’s Exhibit 6, portions of an interview conducted by the relevant parties as described. Since the parties have so agreed, you are to take these facts as true for the purpose of this case.”

“A stipulation is a judicial admission and ordinarily is binding on the parties who make it.” *State v. Murchinson*, 18 N.C. App. 194, 197, 196 S.E.2d 540, 541 (1973) (citing *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963)).

On appeal, defendant argues that the limiting instruction given by the trial judge violated N.C. Gen Stat. § 15A-1222 because it constituted “an opinion in the presence of the jury on any question of fact to be decided by the jury.” Defendant argues that the wording of the instruction and the fact that the jury was handed only Exhibit 6 (the interview report) after the stipulation was read, rather than Exhibit 6 and 7 (the stipulation), that the jury could have reasonably interpreted the instruction to mean they should take the facts of Hadler’s redacted report as true, resulting in a prejudicial error to defendant.

The stipulation, as read to the jury, stated that the redacted report “may be considered for the purpose of corroboration of the witness, [A.R.]” The trial judge then gave his limiting instruction. The redacted report was admitted pursuant to the stipulation that it may be used for

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purposes of corroboration. There is no indication whatsoever that the trial judge expressed an opinion on any question of fact to be decided by the jury in violation of N.C. Gen. Stat. § 15A-1222 or as to whether a fact had been proved in violation of N.C. Gen. Stat. § 15A-1232. The information contained in Exhibit 7, the stipulation, was to be accepted by the jury as true without further proof. The information in Exhibit 6, the redacted report, was to be used for the purposes of corroboration of A.R.'s testimony. There was no question of fact for the trial judge to express an opinion, with regard to either the stipulation or the redacted report.

"In determining whether the trial judge has expressed an impermissible opinion in its instructions to the jury, '[t]he charge of the court must be read as a whole, in the same connected way that the judge is supposed to have intended it and the jury to have considered it.'" *State v. Smith*, 160 N.C. App. 107, 120, 584 S.E.2d 830, 838 (2003) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970)). As long as the jury instructions, viewed in context, present the law "fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." 160 N.C. App. at 120, 584 S.E.2d at 839. We hold that these principles apply not only to the final jury charge, but also to limiting instructions given by the court during trial.

The parties clearly stated that the stipulation was Exhibit 7 and that the interview referenced therein was Exhibit 6. When reading the stipulation, Mr. Thompson stated, "That stipulation, Your Honor, is State's Exhibit 7. The actual portion of the evidence we're introducing is State's Exhibit 6." Judge Hardin then stated, "I want to make sure that you understand that the State of North Carolina and the defendant have agreed or *stipulated that certain facts shall be accepted by you as true without further proof.*" (emphasis added) This makes it clear that the facts to be accepted as true were those contained in the stipulation (Exhibit 7).

"[U]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Green*, 129 N.C. App. 539, 545, 500 S.E.2d 452, 456 (1998) *aff'd*, 350 N.C. 59, 510 S.E.2d 375 (1999) (citing *State v. Larrimore*, 340 N.C. 119, 154-55, 456 S.E.2d 789, 808 (1995)). There is no reason to believe that the stipulation or limiting instruction had a prejudicial effect on the result of the trial.

Judge Hardin did not express any opinion to the jury in his instructions concerning the stipulation. Judge Hardin simply instructed the jury

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as to the parties' stipulation. Nothing in his instructions to the jury indicated any personal opinion as to the facts of the case.

The dissent acknowledges that a "totality of the circumstances" test should be used to determine whether a trial court has made an improper expression of opinion. *State v. Mucci*, 163 N.C. App. 615, 620, 594 S.E.2d 411, 415 (2004) (quoting *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001)). However, it then proceeds to parse the language used by Judge Hardin to support its conclusions.

The trial court did not express opinion in his limiting instruction to the jury, and taken as a whole, the instructions did not prejudice defendant.

This argument is without merit.

III. Admissibility of Report

[2] In his second argument, defendant contends that the trial court committed plain error by admitting Hadler's redacted report into evidence. We disagree.

A. Standard of Review

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." *See id.* (citations and quotation marks omitted); *see also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

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B. Analysis

Defendant's trial counsel made no objection to the information contained in the report at trial and stipulated to the admission of the redacted report into evidence. However, even in the face of his trial stipulation, defendant argues on appeal that the admission of Hadler's redacted report is still reviewable under plain error.

Generally, plain error analysis applies only to jury instructions and evidentiary matters. *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109 (1998). We have been unable to find any case law supporting the proposition that evidence received pursuant to a stipulation may be reviewed under plain error. *See State v. Marlow*, ___ N.C. App. ___, 747 S.E.2d 741, 745 (2013) (finding that "while the law is clear on when our courts are permitted to use the plain error analysis, it is not clear whether stipulations fall within the purview of such parameters."), *appeal dismissed*, ___ N.C. ___, 752 S.E.2d 493 (2013).

"Plain error review is appropriate when a defendant fails to preserve the issue for appeal by properly objecting to the admission of evidence at trial." *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citing *State v. Rourke*, 143 N.C. App. 672, 675, 548 S.E.2d 188, 190 (2001)).

A stipulation is a judicial admission, voluntarily made by the parties to admit evidence at trial. In the instant case, defendant entered into a written stipulation with the State. It would be indefensible to allow a defendant to enter into a stipulation and then to challenge the evidence admitted pursuant to the stipulation on appeal. The essence of plain error is the failure of a defendant to object, coupled with a "fundamental error" by the trial court in allowing the evidence to be received even in the absence of an objection. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position." *Rural Plumbing and Heating, Inc. v. H. C. Jones Const. Co.*, 268 N.C. 23, 31, 149 S.E.2d 625, 631 (1966) (citing *Austin v. Hopkins*, 227 N.C. 638, 43 S.E.2d 849 (1947)).

The conduct of defendant in entering into a stipulation at trial and then seeking to repudiate it on appeal is more akin to invited error than plain error. "[A] defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review." *State v. Jones*, 213 N.C. App. 59, 67, 711 S.E.2d 791, 796 (2011) (quoting *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416

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(2001)). Therefore, “[a]lthough defendant labels this [issue on appeal] as ‘plain error,’ it is actually invited error because, as the transcript reveals, defendant consented to the manner in which the trial court gave the instructions to the jury.” *State v. Fox*, 216 N.C. App. 153, 160, 716 S.E.2d 261, 266-67 (2011) (citing *State v. Wilkinson*, 344 N.C. 198, 235–36, 474 S.E.2d 375, 396 (1996)).

In the instant case, defendant agreed to the language of the stipulation and limiting instruction at trial. Defendant made no objection at trial to the limiting instruction, stipulation, or to the substance of the redacted report when it was entered into evidence. We hold that the concept of plain error is not applicable to stipulations entered into at trial.

This argument is without merit.

IV. Ineffective Assistance of Counsel

In his third argument, defendant contends that he received ineffective assistance of counsel when his trial attorney stipulated to the admission of the report and failed to object to the trial court’s instruction regarding the report. We disagree.

A. Standard of Review

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), cert. denied, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

B. Analysis

Generally, to establish a claim for ineffective assistance of counsel, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*

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v. Washington, 466 U.S. 668, 694, 80 L.Ed.2d 674, 698 (1984). The Supreme Court has noted that, “Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” 466 U.S. at 689, 80 L.Ed.2d at 694.

In the present case, the record does not provide sufficient information to determine whether trial counsel’s decision to agree to the stipulation of the report was the result of a legitimate trial strategy. The report that was entered into evidence arguably bolstered defendant’s position by demonstrating the victim’s lack of coherence in her story of the events. Defendant’s claim of ineffective assistance of counsel is dismissed without prejudice to filing a motion for appropriate relief in the trial court.

NO ERROR IN PART, DISMISSED IN PART.

Judge BRYANT concurs.

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

I concur with the portions of the majority opinion regarding plain error review of stipulations on appeal and defendant’s argument that he was denied effective assistance of counsel. However, because I believe that the trial court’s instruction could have been reasonably interpreted by the jury as a mandate to accept certain disputed facts of this case as true, in violation of N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 (2013), I respectfully dissent and conclude that defendant should be granted a new trial.

Background

Defendant was indicted for taking indecent liberties with a child on 15 February 2010. A superseding indictment charging defendant with one count of indecent liberties with a child and one count of statutory rape was issued on 26 November 2012.

At trial, defendant’s stepdaughter, A.R., testified that defendant sexually abused her repeatedly over a number of years, beginning when she was either ten or eleven years old. By stipulation of the parties, the State entered into evidence a redacted interview report by Janet Hadler

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(“Hadler”), a clinical social worker who interviewed A.R. The report contained numerous accusations of abuse by A.R., specifically that: (1) defendant sexually abused A.R. and her sister beginning when A.R. was eleven years old; (2) defendant had sexual intercourse with A.R. and took her virginity; and (3) defendant continued to have sex with A.R. “every time he can get away from [A.R.’s] mother.” The report also contained Hadler’s professional opinion as to these accusations, which appeared as follows:

[A.R.]’s TSCC¹ is considered to be valid. . . . [A.R.]’s scores were in the clinically significant range for the following TSCC Clinical Scales/Subscales: Anxiety (T-score 67), . . . Fantasy (T-score 68), Sexual Concerns (T-score 120), Sexual Preoccupation (T-score 105), and Sexual Distress (T-score 133.) According to the manual, T-scores at or above 65 are considered clinically significant. For the SC (sexual concerns) scale and it’s [sic] subscales SC-P and SC-D, T-scores at or above 70 are considered clinically significant. The manual states, “children with especially elevated scores on the SC scale may have been prematurely sexualized or sexually traumatized. This can occur as a result of childhood sexual abuse exposure to pornography, witnessing sexual acts, or, in the case of adolescents, sexual assault by a peer.”

Hadler was unable to testify at trial due to a family illness. According to the stipulation, the parties agreed to let redacted portions of her report come in for the purpose of corroborating A.R.’s testimony. The stipulation read as follows:

Janet Hadler, a licensed clinical social worker, performed a child family evaluation of [A.R.] in September and October of 2009. Ms. Hadler is unavailable due to family illness. The parties have stipulated that the portion of her report of her interview with [A.R.] may be entered into evidence without her presence. This evidence may be considered for the purpose of corroboration of the witness,[A.R.].

While the jury was dismissed, the trial judge indicated to counsel that he would allow the report to be entered into evidence as State’s Exhibit 6 pursuant to the agreed-upon stipulation, which would be marked as State’s Exhibit 7.

1. It is unclear from the record what “TSCC” stands for.

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Following the bench conference, the jury returned to the courtroom. The State's attorney read the agreed-upon stipulation to the jury and moved, without objection, to enter State's Exhibits 6 and 7 into evidence. The State's attorney then moved to publish copies of Hadler's report to the jury, whereupon the trial judge, before granting the motion to publish, instructed the jury as follows:

Now, before we proceed, ladies and gentlemen, I want to make sure that you understand that the State of North Carolina and the defendant have agreed or stipulated that certain facts shall be accepted by you as true without further proof.

The agreed facts in this case relate to what is marked as State's Exhibit 7 and now received as a stipulation and State's Exhibit 6, portions of an interview conducted by the relevant parties as described.

Since the parties have so agreed, you are to take these facts as true for the purposes of this case.

On 26 February 2013, the jury returned guilty verdicts against defendant for one count of taking indecent liberties with a child and one count of statutory rape; he was sentenced to 336 to 415 months active imprisonment.

Discussion

Defendant argues that the trial judge failed to give a promised limiting instruction and violated statutory mandates of sections 15A-1222 and 15A-1232 prohibiting a trial judge from expressing an opinion (1) as to whether or not a fact has been proved and (2) on any question of fact to be decided by the jury, because the judge inadvertently instructed the jury to consider the facts contained in Hadler's report as true. After carefully reviewing the record and transcript of the trial, I agree. I would hold that the trial court inadvertently erred in its jury instruction on the stipulation, and because this error prejudiced defendant, I would order a new trial.

Typically, in order to preserve an argument for appellate review, a defendant must have "presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1) (2013). Defendant here failed to object to the trial court's instruction. However,

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the North Carolina Supreme Court has held that “[w]henever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory provisions.” *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005). Defendant has made such allegations in this case, and thus, these arguments are preserved notwithstanding defendant’s failure to object at trial. *See id.* On appeal, the burden is on the defendant to show that he was prejudiced by the allegedly improper remarks. *See State v. McNeil*, 209 N.C. App. 654, 666, 707 S.E.2d 674, 683 (2011). That is, he must show that “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached” by the jury. *Id.*; *see also* N.C. Gen. Stat. § 15A-1443(a) (2013).

N.C. Gen. Stat. § 15A-1222 provides that a trial judge “may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.” N.C. Gen. Stat. § 15A-1232 further states in relevant part that “[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved[.]” Prejudicial error results where “the jury may reasonably infer from the evidence before it that the trial judge’s action intimated an opinion as to a factual issue, the defendant’s guilt, the weight of the evidence or a witness’s credibility[.]” *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). “Whether a trial court’s comment constitutes an improper expression of opinion is determined by its probable meaning to the jury, not by the judge’s motive. Furthermore, a totality of the circumstances test is utilized under which defendant has the burden of showing prejudice.” *State v. Mucci*, 163 N.C. App. 615, 620, 594 S.E.2d 411, 415 (2004) (alteration in original) (citations and internal quotation marks omitted).

Here, while outside the presence of the jury, counsel for defendant and the State conferred with the trial judge regarding the stipulation. The substance of the stipulation was that: (1) Hadler was unavailable to testify at trial; (2) portions of her report were to be admitted into evidence; and (3) these redacted portions may be considered for the purpose of corroborating A.R.’s testimony. The trial court informed counsel that it would instruct the jury as to this stipulation based on N.C.P.I. Civil 101.41, which provides that juries are to accept stipulated facts as true without further proof. Specifically, the trial court informed counsel that it would instruct the jury as follows: “[F]acts have been stated in the record as it relates to stipulation as described in State’s Exhibit 7 since

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the parties have so agreed. You will take these facts as true for the purpose of this case.” However, when the jury returned to the courtroom, the following colloquy took place:

THE COURT: All right. The jurors are now present with us in the courtroom. Mr. Thompson [counsel for the State], ready to proceed?

MR. THOMPSON: We are, Your Honor.

Your Honor, at this time the State would make this following tender of stipulation.

Janet Hadler, a licensed clinical social worker, performed a child family evaluation of [A.R.] in September and October of 2009. Ms. Hadler is unavailable due to family illness. The parties have stipulated that the portion of her report of her interview with [A.R.] may be entered into evidence without her presence. This evidence may be considered for the purpose of corroboration of the witness, [A.R.]. That stipulation, Your Honor, is State’s Exhibit 7.

The actual portion of the evidence we’re introducing is State’s Exhibit 6. We move to enter 6 and 7 at this time.

THE COURT: What says the defendant?

MR. MARTIN [defense counsel]: No objection.

THE COURT: All right. Without objection what is marked as State’s Exhibit 6 and State’s Exhibit 7 each is admitted and received.

MR. THOMPSON: At this time, Your Honor, we ask to publish the copies to the jury.

THE COURT: Now, before we proceed, ladies and gentlemen, I want to make sure that you understand that the State of North Carolina and the defendant have agreed or stipulated that certain facts shall be accepted by you as true without further proof.

The agreed facts in this case relate to what is marked as State’s Exhibit 7 and now received as a stipulation and State’s Exhibit 6, portions of an interview conducted by the relevant parties as described.

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Since the parties have so agreed, you are to take these facts as true for the purposes of this case. The motion to publish is allowed.

It's my impression, ladies and gentlemen, you all each have a copy of *State's Exhibit 6*. If you will read that to yourselves, again, without comment. And once you've completed your review of the document, pass that back down to the bailiff so that we know that you've completed your examination of that report.

(Whereas State's Exhibit No. 6 was published to the jury.)

(Emphasis added.)

The State argues, and the majority agrees, that the trial court did not violate sections 15A-1222 or 15A-1232 because it did not instruct the jury to read Hadler's report as true. Rather, the statement that "the agreed facts in this case relate to . . . State's Exhibit 6" merely indicated that the actual stipulation in State's Exhibit 7 related to the admissibility of State's Exhibit 6.

However, on appeal, this Court is to consider the instruction's "probable meaning to the jury" under the totality of the circumstances. *Mucci*, 163 N.C. App. at 620, 594 S.E.2d at 415. The attendant circumstances and wording of the instruction leads me to conclude that the jury could have reasonably interpreted the trial court's statement as requiring the jury members to accept Hadler's report as true, in clear, but inadvertent, violation of sections 15A-1222 and 15A-1232.

First, the trial court told the jury that "[t]he agreed facts in this case relate to what is marked as State's Exhibit 7 and now received as a stipulation and State's Exhibit 6, portions of an interview conducted by the relevant parties as described." (Emphasis added.) The use of the conjunctive "and" in this instruction unavoidably combined both exhibits under the umbrella of what the "agreed facts . . . relate to," even though the trial judge told counsel during the bench conference that he would only instruct the jury that "facts have been stated in the record as it relates to stipulation as described in State's Exhibit 7 since the parties have so agreed. You will take these facts as true for the purpose of this case." Thus, the trial court's instruction to the jury differed materially from the instruction it promised counsel it was going to make while the jury was outside the courtroom, indicating that the reference to State's Exhibit 6 was unplanned and inadvertent.

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Furthermore, the trial court failed to clarify that the redacted portions of Hadler's report were not to be considered for substantive purposes at all. Despite the agreement made between counsel outside the presence of the jury that the report would only be admitted for corroborative purposes, the trial court never specifically instructed, either before or after publishing the document to the jury, that there were limits on the admissibility of Hadler's report. The stipulation itself provided only that Hadler's report "*may* be considered for the purpose of corroboration of the witness, [A.R.]." (Emphasis added.) The jury was never instructed at any point of the trial that it *may not* consider the report as substantive evidence of defendant's guilt. During the jury charge, the trial court instructed the jury that:

Evidence has been received tending to show that at an earlier time *a witness* made a statement which may be consistent or may conflict with the testimony of the witness at this trial.

You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.

If you believe that the earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this and all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve the testimony of the witness.

(Emphasis added.) Thus, the trial court failed to specify that Hadler's report, which included not only statements from A.R. but also Hadler's professional opinion on the clinical significance of those statements, was only admitted to corroborate A.R.'s testimony and was not to be considered for any other purpose. *See State v. McMillan*, 55 N.C. App. 25, 30, 284 S.E.2d 526, 530 (1981) (finding error where the trial court instructed on prior statements of "a witness" but failed to specify the limit on admissibility related solely to the specific witness's statements). Accordingly, the trial court's instruction to "take these facts as true," with the facts "relating to" both the stipulation and Hadler's report, was more amenable to being interpreted as invitation to read Hadler's report as true given the lack of specific limiting instructions on that exhibit.

Second, only Hadler's report, and not the stipulation itself, was published to the jury immediately following the trial court's ambiguous

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instruction. I believe that the jury could have reasonably inferred that what was being published to them was the subject of the instruction; or in other words, that Hadler's report was the document that the jury members were to read as true. This conclusion is especially availing given that the trial court said "you are to take these facts as true for the purposes of this case" immediately after saying "[t]he agreed facts in this case relate to . . . State's Exhibit 6, portions of an interview conducted by the relevant parties as described," just before publishing State's Exhibit 6 to the jury, and without any clarification regarding the stipulation that Hadler's report "*may* be considered for the purpose of corroboration[.]" (Emphasis added.)

Based on the totality of the circumstances, *Mucci*, 163 N.C. App. at 620, 594 S.E.2d at 415, I would hold that the challenged instruction could have been reasonably interpreted by the jury as requiring them to read Hadler's report as true. In giving this instruction, the trial court both bolstered the credibility of the prosecuting witness, A.R., and afforded undue evidentiary weight to Hadler's conclusions in the report regarding the clinical significance of A.R.'s "T-scores." Each of which constitutes prejudicial error. *See Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248 ("[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results.").

Therefore, while it is clear that this error was inadvertent, the jury may have reasonably believed that they were instructed to read the statements in Hadler's redacted report as true, in which case the trial court inherently intimated an opinion as to the weight of this evidence, and prejudicial error resulted. *See Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248.

Conclusion

Based on the foregoing, I would hold that the trial judge inadvertently erred by giving an instruction constituting an impermissible expression of judicial opinion in violation of sections 15A-1222 and 15A-1232. Because this error bolstered the credibility of the prosecuting witness and afforded undue weight to a report admitted solely for corroborative purposes, I would conclude that defendant was prejudiced by this error, requiring a new trial.

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[235 N.C. App. 513 (2014)]

STATE OF NORTH CAROLINA

v.

GREGGORY GEORGE MOSHER, JR., DEFENDANT

No. COA13-1101

Filed 5 August 2014

Sentencing—felony child abuse resulting in serious bodily injury—two separate offenses—charges not mutually exclusive

The trial court did not err by entering judgment on defendant's convictions for both felony child abuse resulting in serious bodily injury in violation of N.C.G.S. § 14-318.4(a3) and felony child abuse resulting in serious bodily injury in violation of N.C.G.S. § 14-318.4(a4). There was substantial evidence presented at trial permitting the jury to find that two separate offenses occurred in succession such that the two charges were not mutually exclusive.

Appeal by defendant from judgment entered 23 April 2013 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 6 February 2014.

Roy Cooper, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

DAVIS, Judge.

Greggory George Mosher, Jr. ("Defendant") appeals from his convictions for one count of felony child abuse resulting in serious bodily injury in violation of N.C. Gen. Stat. § 14-318.4(a3) and one count of felony child abuse resulting in serious bodily injury in violation of N.C. Gen. Stat. § 14-318.4(a4). Defendant's sole argument on appeal is that the trial court erred in entering judgment on both of his convictions because the two offenses are mutually exclusive. After careful review, we affirm the trial court's judgment.

Factual Background

The evidence presented at trial tended to establish the following facts: In September of 2009, Defendant married Rebecca Mosher ("Ms. Mosher") and became a stepfather to her two young children, "Amy"

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and “Noah.”¹ Defendant was deployed to Iraq in December of 2009, and when he returned from his deployment, he lived with Ms. Mosher and the children at a home in Richlands, North Carolina. Their next-door neighbors, Jack Underwood (“Mr. Underwood”) and Justus Underwood (“Mrs. Underwood”), had observed bruising on the children before the subject incidents.

On 14 May 2010, Ms. Mosher, accompanied by Defendant, visited the Underwoods’ home and requested that Mr. Underwood examine Noah’s arm, which was swollen. Mr. Underwood recommended that Noah be taken to the hospital because he might have a broken arm or wrist. Mrs. Underwood testified that during this encounter, Ms. Mosher was standing behind Defendant and trying to catch her attention in a way that Mrs. Underwood interpreted as meaning: “This is suspicious; you need to pay attention.” Later that day, Ms. Mosher showed Mrs. Underwood marks on the children’s bodies, including bruising on Noah’s arm, legs, and side and bruising on Amy’s back. Mrs. Underwood further explained that “[t]he children did not have marks on them prior to [Defendant] coming home. They would mysteriously appear when [Ms. Mosher] would be out.”

On the evening of 23 May 2010, Defendant was at home alone with Amy and Noah. At the time, Amy was two years old and Noah was three years old. Neither Amy nor Noah testified at trial; therefore, the evidence regarding the specific events giving rise to Defendant’s convictions consisted entirely of Defendant’s own testimony and testimony concerning the accounts he had provided to physicians and a social worker.

At approximately 7:00 p.m., Defendant began preparing a bath for Amy and Noah. Defendant turned on the water and placed the children into the bathtub. As the water was running and filling up the tub, Defendant heard his dog fighting outside and making a sound that Defendant described as “a vicious growl.” Defendant testified that he left the children in the tub with the water running and went to check on the dog. He kicked another dog off of his dog, placed his dog’s collar and chain back on, and returned to the bathroom. Defendant estimated that he had left the children in the tub for what “felt like a minute.” Immediately upon returning to the bathroom, Defendant saw Noah standing outside the tub. Amy was still in the tub, screaming and “splashing to get out.” Defendant grabbed Amy out of the tub and saw that her legs were peeling. He reached to turn off the water and noticed

1. Pseudonyms are used throughout this opinion to protect the privacy of the minor children.

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that the cold water faucet was off. When he pulled out the drain plug, he discovered the bath water was “hot.”

Amy was taken to the hospital and remained hospitalized until 12 July 2010. She sustained burns to approximately 44 percent of her body and underwent two surgeries to remove the burned skin and replace it with healthy tissue. Dr. Kenya McNeal-Trice (“Dr. McNeal-Trice”), a board-certified pediatrician and a member of Amy’s treatment team at the North Carolina Children’s Hospital, was tendered and accepted as an expert witness in the field of pediatrics and child abuse and neglect. She testified to a reasonable degree of medical certainty that Amy’s injuries were consistent with an intentional — rather than accidental — burn and explained that the pattern of Amy’s burn injuries was not consistent with the information Defendant had conveyed to her about how the injuries had occurred. Specifically, Dr. McNeal-Trice testified that Amy’s burns were “more consistent with being exposed for a period of time in a still position in hot water and not splashing to get out.” She explained that if Amy had been standing and splashing to get out, the backs of her legs would not have remained unburned and instead Amy would have sustained a circumferential burn “all the way around her leg.”

In addition, Dr. McNeal-Trice opined that the fact that Amy did not burn her hands, stomach, or torso was inconsistent with a child splashing to get out of scalding hot water. Dr. McNeal-Trice noted that there were “sharp water demarcation lines” on Amy’s thighs, a potential indication that the burn was intentionally inflicted, and that Amy had petechial bruising on her sternum, which was likely caused by “some type of either pressure or force” being applied to her chest.

Defendant’s expert witness, Dr. Allen Dimick (“Dr. Dimick”), was tendered and accepted as an expert in the fields of burn trauma care, burn surgery, and pre-hospital emergency care. He examined Amy’s medical records, records from the investigation conducted by the Onslow County Sheriff’s Office, and photographs of her burns and testified to a reasonable degree of medical certainty that Amy’s burns “were completely accidental and not intentional.” Dr. Dimick testified that in his opinion, Amy likely suffered the second-degree “scald burns” on her back and buttocks from lying or falling back into the hot water and reacted to those burns by changing position to kneel on her knees, which resulted in the more severe burns to her thighs, legs, and the tops of her feet.

Dr. Dimick conceded, however, that he had “difficulty understanding” how Amy had sustained her particular burn injury pattern and that it

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was “hard to envision how that could occur” unless she had fallen backwards on her back into the water and then changed position to kneel on her knees. Dr. Dimick testified that he did not believe that Amy’s injuries were consistent with someone “pushing her backward and holding her down,” noting that the burns to her back were less severe, indicating a briefer exposure to the hot water. However, he did agree that Amy “certainly” could have sustained the burns to her back if she was pushed down into the water for a brief period of time.

On 18 January 2011, Defendant was indicted on two felony child abuse charges. The first charge alleged that Defendant had intentionally inflicted a serious bodily injury to Amy in violation of N.C. Gen. Stat. § 14-318.4(a3), and the second charge alleged that Defendant, by a willful act or grossly negligent omission, showed a reckless disregard for human life which resulted in serious bodily injury to Amy in violation of N.C. Gen. Stat. § 14-318.4(a4).

A jury trial was held on 15 April 2013, and on 23 April 2013, the jury returned a verdict finding Defendant guilty of both offenses. The trial court consolidated the offenses and entered a judgment sentencing Defendant to a presumptive-range term of 58 to 79 months imprisonment. Defendant gave notice of appeal in open court.

Analysis

Defendant contends that the trial court erred in entering judgment on both counts of felony child abuse — the intentional infliction of a serious bodily injury to a child in violation of N.C. Gen. Stat. § 14-318.4(a3) and the willful act or grossly negligent omission showing a reckless disregard for human life and resulting in a serious bodily injury to a child in violation of N.C. Gen. Stat. § 318.4(a4) — because the two offenses are mutually exclusive. We disagree. As explained below, we conclude that the evidence at trial permitted the jury to find both that (1) Defendant acted in reckless disregard for human life by initially leaving Amy and Noah unattended in a tub of scalding hot water; and (2) after a period of time, Defendant returned to the tub and intentionally held Amy in that water.

Criminal offenses are mutually exclusive if “guilt of one necessarily excludes guilt of the other.” *State v. Mumford*, 364 N.C. 394, 400, 699 S.E.2d 911, 915 (2010) (citation and quotation marks omitted). For example, our Supreme Court has held that a defendant may not be convicted of both embezzlement and obtaining property by false pretenses when the charges arise out of the same act or transaction, explaining that

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to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted. On the other hand, to constitute false pretenses the property must be acquired unlawfully at the outset, pursuant to a false representation. This Court has previously held that, since property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other.

State v. Speckman, 326 N.C. 576, 578, 391 S.E.2d 165, 166-67 (1990) (internal citations omitted).

Here, Defendant was convicted of two counts of felony child abuse under two separate subsections of N.C. Gen. Stat. § 14-318.4. The first count, child abuse inflicting serious bodily injury in violation of § 14-318.4(a3), required the State to prove that Defendant (1) is a parent or any other person providing care to or supervision of a child less than 16 years of age; and (2) intentionally inflicted any serious bodily injury to the child. *See* N.C. Gen. Stat. § 14-318.4(a3) (2013).²

Defendant's second count, child abuse by willful act or negligent omission showing a reckless disregard for human life resulting in serious bodily injury, required the State to establish that (1) Defendant is a parent or any other person providing care to or supervision of a child less than 16 years of age; (2) Defendant's willful act or negligent omission in the care of the child showed a reckless disregard for human life; and (3) the act or omission resulted in serious bodily injury to the child. *See* N.C. Gen. Stat. § 14-318.4(a4).

Defendant argues that the *mens rea* component of each offense makes the two crimes mutually exclusive because "[i]f one's conduct is intentional, as required to establish the offense defined in subsection (a3) of the statute, it is not any sort of negligence" and that "if one's conduct is any sort of negligence showing reckless disregard for human life, as required to establish the offense defined in subsection (a4) of the statute, it is not intentional." We conclude, however, that there was substantial evidence presented at trial permitting the jury to find that

2. The statute defines serious bodily injury as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(d)(1).

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two separate offenses occurred in succession such that the two charges were not mutually exclusive.

We are guided by our decision in *State v. Johnson*, 208 N.C. App. 443, 702 S.E.2d 547 (2010), *disc. review denied*, ___ N.C. ___, 706 S.E.2d 247 (2011), which — although arising in a wholly different factual context than the present case — sheds light on the legal issue presented here. In *Johnson*, the defendant argued that the trial court erred by entering judgment on both his conviction for felony entering and his conviction for discharging a firearm into an occupied dwelling inflicting serious bodily injury because the two offenses were mutually exclusive. *Id.* at 448, 702 S.E.2d at 551. Specifically, he argued that the trial court should not have entered judgment against him for discharging a firearm *into* the victim's residence because his entry into the residence had already been accomplished at the time the shots were fired. *Id.*

We rejected this argument, holding that the facts of the case were sufficient to support a conclusion that the two crimes were committed in succession and, as a result, the defendant's guilt of one offense did not exclude his guilt of the other. *Id.* at 449, 702 S.E.2d at 551. We explained that the evidence tended to show that the defendant and his copерpetrator, acting in concert, committed the entry when the copерpetrator inserted his hand into the partially-opened front door. He then removed his hand (and the firearm he was holding) from the interior of the residence and subsequently fired into the home through the door as evidenced by a bullet hole found in the door panel above the lock. *Id.* We concluded that these facts established that the two offenses occurred in succession and, therefore, were not mutually exclusive, finding merit in the State's contention that "[t]he mere fact that the shooter entered [the victim's] house at one point does not mean that the shooter was at all times thereafter inside [the victim's] house." *Id.*

Here, evidence was presented from which a reasonable juror could conclude that Defendant both (1) committed a willful act or negligent omission showing a reckless disregard for human life resulting in a serious bodily injury to Amy by leaving her unattended in a bathtub with the water on; and (2) intentionally inflicted a serious bodily injury to Amy thereafter by deliberately immersing her in scalding water.

Defendant, by his own admission, left Amy and Noah, who were two and three years old respectively, unattended in the bathtub while the water was running for what "felt like a minute." Defendant testified that he thought he turned on both the hot and cold water but that he could not be certain. Evidence was presented at trial that when the hot water

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is turned on in that bathtub, the water reaches 100 degrees Fahrenheit in 10 seconds, 115 degrees in 20 seconds, 119 degrees in 30 seconds, and 184 degrees in one minute. There was also testimony that an individual would sustain a third-degree burn from one second of exposure to 155-degree water, five seconds of exposure to 140-degree water, and 60 seconds of exposure to 127-degree water. We believe that from this evidence the jury could reasonably conclude that Defendant, by leaving the children alone in the tub, acted in a manner that showed a reckless disregard for human life, thereby constituting a violation of N.C. Gen. Stat. § 14-318.4(a4).

We also conclude that substantial evidence was presented supporting a finding of a *separate* act of intentional infliction of a serious bodily injury. The State put forth circumstantial evidence that Amy was intentionally immersed in scalding hot water by Defendant. Specifically, the State offered evidence that (1) Amy had bruising on her chest, suggesting the application of pressure or force to that area of her body; and (2) the burns on her legs had sharp demarcation lines, indicating that she was forcibly held still while in the tub. This evidence was sufficient to support a conviction for intentionally inflicting serious bodily injury to Amy in violation of N.C. Gen. Stat. § 14-318.4(a3).

As such, the jury could have reasonably concluded that two separate, successive acts of felonious child abuse occurred — one causing a serious bodily injury through a reckless disregard for human life and one intentionally causing such an injury. A finding by the jury that Defendant acted in reckless disregard for human life by initially leaving Amy and Noah unattended in the tub did not preclude a separate finding that Defendant's conduct upon returning to the tub was intentional. Consequently, Defendant's argument is overruled, and the trial court's judgment is affirmed.

Conclusion

For the reasons stated above, we affirm the trial court's entry of judgment on Defendant's felony child abuse convictions.

AFFIRMED.

Judges CALABRIA and STROUD concur.

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KIRK ALAN TURNER, PLAINTIFF

v.

SPECIAL AGENT GERALD R. THOMAS, IN HIS INDIVIDUAL CAPACITY AND, IN THE ALTERNATIVE, IN HIS OFFICIAL CAPACITY; SPECIAL AGENT DUANE DEEVER, IN HIS INDIVIDUAL CAPACITY AND, IN THE ALTERNATIVE, IN HIS OFFICIAL CAPACITY; ROBIN PENDERGRAFT, IN HER INDIVIDUAL CAPACITY AND, IN THE ALTERNATIVE, IN HER OFFICIAL CAPACITY; AND JOHN AND JANE DOE SBI SUPERVISORS, IN THEIR INDIVIDUAL CAPACITIES AND, IN THE ALTERNATIVE IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

No. COA13-1131

Filed 5 August 2014

Malicious Prosecution—intentional infliction of emotional distress—allegations in complaint—sufficient to state claims—not barred by statute of limitations

The trial court erred by dismissing plaintiff's claims for malicious prosecution and intentional infliction of emotional distress against defendants Thomas and Deaver. The allegations of the complaint, when treated as true, were sufficient to state claims for relief, and the complaint did not contain allegations establishing that those claims were barred by the statute of limitations.

Appeal by plaintiff from order entered 11 April 2013 by Judge Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 5 March 2014.

Morrow, Porter, Vermitsky & Fowler, PLLC, by John C. Vermitsky, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Angel E. Gray, Special Deputy Attorney General Grady Balentine, Jr., and Assistant Attorney General Matthew Boyatt, for defendants-appellees.

GEER, Judge.

Plaintiff Kirk Allan Turner appeals from an order granting the motions of defendants Gerald R. Thomas, Duane Deaver, Robin Pendergraft and John and Jane Doe to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure. We agree with plaintiff that the trial court erred in dismissing his state law

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claims against defendants Thomas and Deaver for malicious prosecution and intentional infliction of emotional distress (“IIED”) because the allegations of the complaint, when treated as true, are sufficient to state a claim for relief, and the complaint does not contain allegations establishing that those claims are barred by the statute of limitations. As to plaintiff’s remaining claims, we affirm.

Facts

Plaintiff was tried for the murder of his wife, Jennifer Wittwer Turner, and found not guilty by reason of self defense. Following his acquittal, plaintiff commenced this lawsuit against various officers of the North Carolina State Bureau of Investigation (“SBI”) who were involved in the investigation of his wife’s death. Plaintiff’s complaint alleges the following facts.

On 12 September 2007, plaintiff and his friend Gregory Adam Smithson went to the Turner’s marital residence, where Mrs. Turner was living, to retrieve some of Mr. Smithson’s personal property being stored there. While Mr. Smithson was loading his belongings, plaintiff and Mrs. Turner began talking about personal matters. During the conversation, Mrs. Turner picked up a spear and began attacking plaintiff, stabbing him multiple times in his thigh and groin area. In response, defendant grabbed a pocketknife from his right front pocket and cut Mrs. Turner twice in the neck, causing her death.

Mr. Smithson called 911 and performed CPR on Mrs. Turner until emergency personnel arrived. The Davie County Sheriff’s Office responded to the 911 emergency call and Special Agent E.R. Wall responded on behalf of SBI. Agent Wall notified the SBI Assistant Special Agent in Charge, K.A. Cline, that a blood splatter expert would be needed to analyze the scene. However, after further examination of Mrs. Turner’s body, Agent Wall concluded that the blood splatter patterns at the scene were likely the result of arterial spurting from the large wound in Mrs. Turner’s neck.

Later that evening, Agent Cline arranged for defendant Thomas, a special agent at the SBI, to conduct a blood splatter interpretation of the scene and of several articles of clothing that had been collected during the course of the investigation. On 14 September 2007, defendant Thomas documented the bloodstains and bloodstain patterns at the crime scene and then went to the Davie County Sheriff’s Office to examine clothing and other evidence collected from the scene. Prior to defendant Thomas’ examining any evidence, SBI Special Agent D.J. Smith

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informed him that Mrs. Turner had apparently stabbed plaintiff with a spear and, in response, plaintiff reached into his right front pocket of his pants to retrieve a knife that he used to cut her throat.

Fifteen days later, defendant Thomas wrote a report documenting the bloodstain patterns at the scene and his notes regarding the clothing seized. The report stated that the t-shirt worn by plaintiff on the night of Mrs. Turner's death had a large bloodstain on it consistent with a transfer bloodstain pattern resulting from a bloody hand being wiped on the surface of the shirt.

On 13 December 2007, plaintiff was indicted for first degree murder of Mrs. Turner. Plaintiff was detained for one month before being granted a \$1,000,000.00 bond. When plaintiff posted bail, he was released on house arrest.

On 15 January 2008, defendant Thomas met with defendant Deaver, an SBI special agent; an attorney with the District Attorney's office; Captain Jerry Hartman, the lead investigator for the Davie County Sherriff's Office; and "Mr. Marks" to discuss the feasibility of plaintiff's version of events leading to Mrs. Turner's death. At that meeting, the men theorized that plaintiff killed Mrs. Turner as part of an elaborate scheme in which plaintiff stabbed himself with the spear and staged the scene to make it look like self defense. To prove this theory, defendants needed to show that the transfer blood stain on plaintiff's shirt was not a mirror image stain from plaintiff's hand, but rather a transfer pattern consistent with plaintiff wiping his knife off on his shirt.

Defendants Thomas and Deaver, with the approval of their supervisor (defendant Pendergraft), then "wantonly and maliciously conducted unscientific tests to 'shore up' the new theory." In conducting the new tests, defendant Thomas retook samples of evidence but failed to properly label his work, and he failed to make a record of his new theory. Defendants Thomas and Deaver videotaped themselves conducting unscientific experiments to try to obtain a blood smear from a knife similar to the smear on plaintiff's shirt. After several attempts, defendants obtained a smear with a knife that looked similar to the smear on plaintiff's shirt. At that point in the video, defendant Deaver can be heard saying, "'Oh, even better! Holy cow, that was a good one!' and 'Beautiful! That's a wrap, baby!'"

After conducting the new tests and reviewing the evidence a second time, defendant Thomas created a second report purportedly discussing the "examination of clothing for bloodstain patterns on Friday, September 14, 2007," even though the actual date of the examination was

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15 January 2008. The second report altered the first report by replacing “‘consistent with a bloody hand wiped on the shirt’ with ‘consistent with a pointed object being wiped on the shirt.’”

Stuart James of Fort Lauderdale, Florida, disagreed with Thomas and Deaver’s blood stain analysis and believed that the blood stain was most likely a “‘mirror stain’” created when the shirt was folded after the shirt was cut off or when it was tossed on the floor.¹ Thomas, however, wrote in his report that Captain Hartman “‘was present when emergency services cut the gray T-shirt from Mr. Turner’s body and that the question [sic] blood stain was observed present in its current condition on the shirt. Hartman said that he took the shirt from Emergency Medical Services and placed it in a secure area [an adjacent room], laying flat on the floor to dry.’”²

Plaintiff’s trial began on 27 July 2009. Defendant Thomas testified at trial consistent with what he had written in his report. Captain Hartman testified, however, that he did not arrive at the crime scene until two hours after EMTs took plaintiff to the hospital and that he was not present when EMTs removed the shirt. Additionally, initial crime scene photos showed that the t-shirt was crumpled on the floor, inside out.

The jury returned a verdict of not guilty of murder by reason of self defense on 21 August 2009. On 14 November 2011, plaintiff filed a complaint against defendants Thomas, Deaver, Pendergraft, and John and Jane Doe in a case docketed as 11 CVS 7812. Defendant Pendergraft is the Director of the SBI, and defendants John and Jane Doe are supervisors for the SBI. On 4 April 2012, plaintiff voluntarily dismissed his complaint in 11 CVS 7812, and filed the complaint which is the subject of this appeal.

Plaintiff’s complaint alleges several causes of action against defendants. As to defendants Thomas and Deaver in their individual capacities, the complaint alleges claims for (1) IIED, (2) Abuse of Process, (3) Malicious Prosecution, and (4) False Imprisonment. As for defendants Pendergraft and Jane and John Doe, plaintiff brought a claim of negligence for their failure to properly train, supervise, and direct defendants

1. It is unclear from the complaint when and in what form Stuart James offered this opinion, whether he testified at plaintiff’s criminal trial, what his credentials were, or how he came to be involved in the case.

2. The complaint does not specify when Thomas added this information to the report, but it could be read to imply that Thomas wrote this in his second report in response to Stuart James’ opinion in an effort to discredit it, but the complaint is vague in this regard.

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Thomas and Deaver. Finally, the complaint asserts claims under 42 U.S.C. § 1983 against all defendants in both their individual and official capacities, and a claim against all defendants in their official capacities for violation of Article I § 19 of the North Carolina Constitution.

Defendants filed motions to dismiss pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7). After a hearing on 8 April 2013, the trial court entered an order granting defendants' motions. In the order, the trial court found that plaintiff conceded to the dismissal of all claims against John and Jane Doe and to the dismissal of the 42 U.S.C. § 1983 claim against all defendants in their official capacities. The order concluded that "Plaintiff's complaint should be dismissed as to all Defendants for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted." In light of this conclusion, the trial court found it "unnecessary to consider the Defendant's Motion to Dismiss for failure to join necessary parties pursuant to 12(b)(7)." Plaintiff timely appealed the order to this Court.

Discussion

On appeal, plaintiff argues that the trial court should not have dismissed the claims of malicious prosecution, abuse of process, IIED, and false imprisonment against defendants Thomas and Deaver, or the 42 U.S.C. § 1983 claims against defendants Thomas, Deaver, and Pendergraft in their individual capacities.

Plaintiff does not challenge the dismissal of the remaining claims including all the claims against defendants John and Jane Doe, and the negligence claim against Pendergraft. Accordingly, we affirm the dismissal of those claims. *See* N.C.R. App. P. 28(a).

Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (internal citation omitted), *disapproved of on other grounds by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Generally, "a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Id.* (quoting 2A *Moore's Federal Practice*, § 12.08 (2d ed. 1975)). "This Court must conduct a *de novo* review of the pleadings to determine

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their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

I. Plaintiff's State Law Claims

Plaintiff sued defendants Thomas and Deaver for malicious prosecution, abuse of process, IED, and false imprisonment. Defendants moved to dismiss these claims on the basis of the statute of limitations, failure to state a claim, and public official immunity.³

With respect to the statute of limitations, the parties agree that the statute of limitations for each of the state law claims is three years, N.C. Gen. Stat. § 1-52 (2013), and that plaintiff initiated this action on 14 November 2011. Therefore, any cause of action that accrued prior to 14 November 2008 is barred by the statute of limitations.

A. Malicious Prosecution

"In order to recover in an action for malicious prosecution, plaintiff must establish that defendant: (1) instituted, procured or participated in the criminal proceeding against plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of plaintiff." *Williams v. Kuppenheimer Mfg. Co.*, 105 N.C. App. 198, 200, 412 S.E.2d 897, 899 (1992). In this case, defendant does not dispute that the prior proceeding terminated in favor of plaintiff in August 2009 when plaintiff was acquitted of first degree murder.

Because the prior proceeding terminated within three years of the initiation of this lawsuit, plaintiff's malicious prosecution claim is not barred by the statute of limitations. Defendants argue, however, that the trial court correctly dismissed this claim because plaintiff's complaint does not sufficiently allege facts to support the first three elements of malicious prosecution.

1. Institution, Procurement, or Participation in the Criminal Proceeding

Defendants Thomas and Deaver argue that plaintiff's complaint fails to adequately allege the element of initiation, procurement, or

3. In his complaint, plaintiff sought to impose liability on defendant Pendergraft for defendants Thomas and Deaver's actions based on a claim of negligent supervision and training. Plaintiff does not, however, on appeal challenge the trial court's dismissal of that negligence claim. Plaintiff has, therefore, chosen not to proceed with any state law claim against defendant Pendergraft.

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participation in the criminal proceeding because “there are no allegations that any of the named defendants personally played any role in presenting the case to the grand jury or in initiating criminal process against the plaintiff. In addition, defendants did not engage in the actions of which plaintiff specifically complains . . . until several months after plaintiff’s arrest and release on bond.”

However, regarding this first element of a malicious prosecution cause of action, this Court has recognized:

[W]hen discussing the tort of malicious prosecution generally, our cases indicate a liberal reading of the requirement that the defendant have “initiated” the earlier proceeding. For example, while some of our decisions involving a claim based upon a prior criminal action have stated a plaintiff must prove the defendant *initiated* the prior criminal proceeding, *see, e.g., Alt v. Parker*, 112 N.C. App. 307, 312, 435 S.E.2d 773, 776 (1993), *disc. review denied*, 335 N.C. 766, 442 S.E.2d 507 (1994), and others have said a plaintiff must show defendant *instituted* the prior proceeding, *see, e.g., Juarez-Martinez v. Deans*, 108 N.C. App. 486, 491, 424 S.E.2d 154, 157, *disc. review denied*, 333 N.C. 539, 429 S.E.2d 558 (1993), still others have held a plaintiff must establish that the defendant “instituted, procured or *participated in* the criminal proceeding against plaintiff.” *Williams*, 105 N.C. App. at 200, 412 S.E.2d at 899 (citation omitted) (emphasis added).

Moore v. City of Creedmoor, 120 N.C. App. 27, 38, 460 S.E.2d 899, 906 (1995), *aff’d in part, rev’d in part on other grounds*, 345 N.C. 356, 481 S.E.2d 14 (1997).

Thus, *Moore* recognized that a showing that a defendant “‘participated in the criminal proceeding’” is sufficient to establish the first element of a malicious prosecution claim for relief. *Id.* (emphasis omitted) (quoting *Williams*, 105 N.C. App. at 200, 412 S.E.2d at 899). Although defendants refer to the inadequacy of plaintiff’s allegations regarding “defendants’ participation *in the procurement of the indictment*” (emphasis added), *Moore*’s holding allowing for a showing of participation in a criminal proceeding generally necessarily contemplates participation after the proceeding has been initiated or instituted. Defendants’ interpretation improperly merges participation into procurement and eliminates one of the three alternative ways that this Court has stated that this element may be established.

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Allowing this element to be established by a showing of participation in the criminal proceeding is consistent with the *Restatement (Second) of Torts*, which indicates that “[a] private person who takes an active part in *continuing or procuring the continuation* of criminal proceedings initiated by himself or by another is subject to the same liability for malicious prosecution as if he had then initiated the proceedings.” *Restatement (Second) Torts* § 655 (1977) (emphasis added). This rule “applies . . . when the proceedings are initiated by a third person, and the defendant, knowing that there is no probable cause for them, thereafter takes an active part in procuring their continuation.” *Id.*, cmt. b.

Although we have not found any North Carolina cases specifically addressing what facts are necessary to show that a defendant sufficiently participated in a criminal proceeding to support a claim for malicious prosecution, we believe that *Williams* is instructive. In *Williams*, this Court explained that “[t]he act of giving honest assistance and information to prosecuting authorities does not render one liable for malicious prosecution.” 105 N.C. App. at 201, 412 S.E.2d at 900.

There, this Court held that the plaintiff presented sufficient evidence of the first element of malicious prosecution when

the jury could find defendant’s actions went further than merely providing assistance and information. Defendant brought all the documents used in the prosecution to the police. As discussed earlier, these documents included the eleven suspicious void sales, the three suspicious alteration tickets, and the names and addresses of witnesses to be contacted. From the record it appears the only additional investigation undertaken by the authorities was to contact the three individuals who had suspicious alterations performed. Law enforcement officials never interviewed other customers, store employees or plaintiff prior to the time of his arrest. Except for the efforts of defendant, it is unlikely there would have been a criminal prosecution of plaintiff.

Id. It follows from this reasoning that once criminal proceedings have been initiated, the first element of malicious prosecution can be established by a showing that defendant participated in the criminal proceedings if “[e]xcept for the efforts of defendant, it is unlikely” that the criminal prosecution would have *continued* against defendant. *Id.*

In this case, the complaint alleges that defendants Thomas and Deaver met with a member of the District Attorney’s office in January

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2008 to help formulate a theory in support of the first degree murder charge. Defendants theorized that Mrs. Turner did not attack plaintiff, but rather that plaintiff stabbed himself with the spear and staged the scene to look like self defense as part of an elaborate scheme.

The complaint further alleges that defendants then devised and executed unscientific tests designed specifically to support the theory, and defendant Thomas altered his initial report to reflect their new findings arising out of those tests. Significantly, the complaint alleges that “[t]his evidence was crucial to maintain probable cause for a first-degree murder charge.” Thus, plaintiff has sufficiently alleged that defendants participated in the criminal proceedings by alleging facts that tend to show that “[e]xcept for the efforts of defendant[s], it is unlikely” that the proceedings would have continued against plaintiff. *Id.*

Accordingly, we hold that plaintiff’s complaint sufficiently alleges the first element of malicious prosecution. *See also Pierce v. Gilchrist*, 359 F.3d 1279, 1291 (10th Cir. 2004) (applying common law elements of malicious prosecution to § 1983 claim and holding allegations sufficient to survive motion to dismiss when complaint alleged that, after plaintiff’s arrest, defendant forensic analyst “‘contrived evidence to secure a fraudulent conviction’” by creating forensic report that was false, without any scientific basis, and in disregard of exculpatory evidence).

2. Probable Cause

Defendants further argue that dismissal was proper because plaintiff’s allegation that there was no probable cause to initiate or pursue criminal charges against plaintiff is impermissibly conclusory and need not be taken as true in considering the motion to dismiss. However, this Court has recognized that “[w]ith the adoption of ‘notice pleading,’ mere vagueness or lack of detail is no longer ground for allowing a motion to dismiss.” *Gatlin v. Bray*, 81 N.C. App. 639, 644, 344 S.E.2d 814, 817 (1986) (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970)). Rather, “[p]leadings comply with our present concept of notice pleading if the allegations in the complaint give defendant sufficient notice of the nature and basis of plaintiffs’ claim to file an answer, and the face of the complaint shows no insurmountable bar to recovery.” *Id.* (quoting *Rose v. Guilford Cnty.*, 60 N.C. App. 170, 173, 298 S.E.2d 200, 202 (1982)).

Under the North Carolina standard for motions to dismiss, plaintiff’s allegation that there was no probable cause is sufficient unless the facts alleged in the complaint conclusively establish that there was probable cause or that there does not exist “‘any state of facts which

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could be proved in support of ” the allegation of lack of probable cause. *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615 (emphasis omitted) (quoting 2A *Moore’s Federal Practice*, § 12.08). “The test for determining probable cause is whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation.’” *Strickland v. Hedrick*, 194 N.C. App. 1, 17, 669 S.E.2d 61, 71 (2008) (quoting *Becker v. Pierce*, 168 N.C. App. 671, 677, 608 S.E.2d 825, 829-30 (2005)).

Defendants argue that the complaint’s allegations that (1) plaintiff “grabbed a pocketknife from his right front pocket and made two cuts in rapid succession to Jennifer Turner’s neck area which resulted in her death[,]” and (2) plaintiff was arrested pursuant to a grand jury indictment conclusively establish the existence of probable cause in this case. We disagree.

First degree murder is the intentional and unlawful killing of a human being with premeditation and deliberation. N.C. Gen. Stat. § 14-17 (2013). The allegation that plaintiff killed Mrs. Turner with a pocket knife, standing alone, is insufficient to establish probable cause that plaintiff acted with malice, premeditation, and deliberation as a matter of law. In determining probable cause, the totality of the circumstances must be considered. Here, the complaint, when viewed in the light most favorable to plaintiff, shows that plaintiff accompanied his friend to Mrs. Turner’s residence in order to help his friend retrieve personal property being stored there. While plaintiff talked to Mrs. Turner, she picked up a large spear and attacked plaintiff, stabbing him several times. In response, plaintiff retrieved a pocketknife from his front pocket and cut Mrs. Turner twice in the neck.

These allegations are consistent with plaintiff’s claim that he only acted in self defense and did not stab Mrs. Turner with malice, premeditation, and deliberation. When viewed in the light most favorable to plaintiff, the facts alleged in the complaint do not establish as a matter of law that there was probable cause to arrest plaintiff for first degree murder.

In support of their argument that the indictment conclusively establishes probable cause, defendants cite *Stanford v. Grocery Co.*, 143 N.C. 419, 426, 55 S.E. 815, 817 (1906), which holds that that a true bill of indictment against a criminal defendant returned by a grand jury is prima facie evidence of probable cause. However, “[w]hile our Supreme Court has said that both a grand jury indictment and a waiver of a preliminary hearing in a criminal action establish a *prima facie* showing of probable cause, nevertheless, such a finding or waiver is not conclusive

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in a subsequent malicious prosecution action, and the question of probable cause is still an issue for the jury.” *Williams*, 105 N.C. App. at 201, 412 S.E.2d at 900. The indictment, therefore, only creates an issue of fact for the jury to determine with respect to the issue of probable cause. Accordingly, we conclude that plaintiff’s complaint sufficiently alleges a lack of probable cause.

3. Malice

Defendants similarly argue that plaintiff’s allegation that defendants acted maliciously is impermissibly conclusory and not supported by the facts alleged. However, in a malicious prosecution claim, “malice may be inferred from want of probable cause.” *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966). Additionally, “[e]vidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest . . . is admissible both to show the absence of probable cause and to create an inference of malice, and such evidence is sufficient to establish a prima facie want of probable cause.” *Id.* (quoting *Dickerson v. Atl. Ref. Co.*, 201 N.C. 90, 95, 159 S.E. 446, 449 (1931)).

Plaintiff alleged that defendants acted with malice, without probable cause, and for the ulterior purposes of political gain and advancing their careers. These allegations are sufficient under *Cook* to establish the element of malice. Although defendants suggest that acting for political gain does not constitute a “collateral purpose” that may raise an inference of malice and a lack of probable cause, they have cited no authority to support such a limitation. As explained by our Supreme Court in *Dickerson*, “[t]he reason for holding that proof of a collateral purpose is sufficient to make out a prima facie want of probable cause is based upon the hypothesis that a person, bent on accomplishing some ulterior motive, will act upon much less convincing evidence than one whose only desire is to promote the public good.” 201 N.C. at 95, 159 S.E. at 450. We see no reason why this rationale does not apply when the ulterior motive is to obtain political gain.

In sum, we conclude that the complaint sufficiently alleges the essential elements of malicious prosecution. Therefore, the trial court erred in dismissing the claim of malicious prosecution as to defendants Thomas and Deaver.

B. Abuse of Process

“[A]buse of process is the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that

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process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attended (sic) to be secured.’” *Stanback*, 297 N.C. at 200, 254 S.E.2d at 624 (quoting *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965)).

More recently, this Court has explained:

“[A]buse of process requires both an ulterior motive and an act in the use of the legal process not proper in the regular prosecution of the proceeding, and that [b]oth requirements relate to the defendant’s purpose to achieve through the use of the process some end foreign to those it was designed to effect. The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process used. The act requirement is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some wilful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter.”

Chidnese v. Chidnese, 210 N.C. App. 299, 310-11, 708 S.E.2d 725, 734-35 (2011) (quoting *Stanback*, 297 N.C. at 201, 254 S.E.2d at 624). “There is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint.” *Mfrs. & Jobbers Fin. Corp. v. Lane*, 221 N.C. 189, 196-97, 19 S.E.2d 849, 853 (1942).

Here, plaintiff alleged that defendants Thomas and Deaver “intentionally and maliciously used their positions as Special Agents with the SBI, tasked with the official duty of investigating the death of Jennifer Wittwer Turner, to obstruct justice and ‘frame’ Dr. Kirk Turner for the first-degree murder of his wife Jennifer Turner after Dr. Kirk Turner was indicted. This was done for the improper purpose of political benefit, and to ensure a conviction in a high profile case where it would be unpopular for the district attorney to enter a dismissal of charges.” The complaint additionally alleged that defendants’ “actions were undertaken for an ulterior motive, that is to secure a conviction of a high publicity murder case regardless of guilt to further the careers of the Defendants and to assist the District Attorney in winning a very public case for political purposes with no regard to the defendant’s guilt or innocence.”

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These allegations are insufficient to support an abuse of process claim because the improper purpose alleged – securing plaintiff’s conviction – is within the intended scope of criminal proceedings. It, therefore, fails to meet the requirement that a defendant use the process to achieve a result “not warranted or commanded by the writ” and “not lawfully or properly obtainable” by the process. *Fowle*, 263 N.C. at 728, 140 S.E.2d at 401. Accordingly, we affirm the trial court’s dismissal of plaintiff’s abuse of process claim under Rule 12(b)(6). *See also Scott v. District of Columbia*, 101 F.3d 748, 756 (D.C. Cir. 1996) (holding that when “officers instituted the criminal charge for precisely the purpose for which it was intended [–] establishing that [plaintiff] was guilty of a criminal offense” – “fact that the officers expected to realize some benefit by covering up their own alleged wrongdoing simply points to an ulterior motive, not the kind of perversion of the judicial process that gives rise to a cause of action for abuse of process”).⁴

C. Intentional Infliction of Emotional Distress

The essential elements of a claim for IIED are “(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another.” *Dickens*, 302 N.C. at 452, 276 S.E.2d at 335. “The tort may also exist where defendant’s actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress.” *Id.*

1. Statute of Limitations

This Court has stated that a cause of action for IIED “does not come into existence until the continued conduct of the defendant causes extreme emotional distress.” *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 12, 437 S.E.2d 519, 525 (1993). In *Bryant*, the plaintiff sued her former employer for IIED based upon allegations of sexual harassment that began more than three years prior to her initiation of the lawsuit. *Id.* at 3, 437 S.E.2d at 521. The defendant raised the defense of the three-year statute of limitations and argued that the statute barred recovery for events occurring more than three years prior to the filing of the lawsuit. *Id.* at 4, 437 S.E.2d at 521. The trial court denied the defendant’s motion for summary judgment and motion in limine to bar evidence of events occurring outside of the period of the statute of limitations. *Id.* A jury returned a verdict in favor of the plaintiff on the IIED claim, and the defendant appealed. *Id.*

4. Because of this holding, we need not address whether the claim is barred by the statute of limitations.

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On appeal, this Court rejected the defendant's contention that "the acts of [the defendant] that occurred prior to December 1986 are barred by the three-year statute" because "[i]f all of the elements of the tort [are] not present, then no cause of action for intentional infliction of emotional distress exist[s] at that time." *Id.* at 13, 437 S.E.2d at 526. The Court explained:

The statutes of limitations serve to bar *claims*, not *evidence* of contributing factors to an ultimate claim that has not yet come into existence. "As our courts have frequently noted, in no event can a statute of limitations begin to run until the plaintiff is entitled to institute action. . . . Ordinarily, the period of the statute of limitations begins to run when *the plaintiff's right* to maintain an action for *the wrong alleged* accrues. The cause of action accrues *when the wrong is complete*. . . ." Obviously, outrageous conduct by the defendant alone would confer no cause of action on the plaintiff in the case until she suffered extreme emotional distress caused by his actions.

Id. (quoting *Bolick v. Am. Barmag Corp.*, 54 N.C. App. 589, 594, 284 S.E.2d 188, 191, *decision modified on other grounds*, 306 N.C. 364, 293 S.E.2d 415 (1981)). This Court held that because the plaintiff's cause of action did not accrue until "the actions of the defendant did in fact cause emotional distress of the calibre set out in *Waddle [v. Sparks]*, 331 N.C. 73, 414 S.E.2d 22 (1992),]" the trial court did not err in denying the defendant's motion in limine. *Id.*

In *Waddle*, the Supreme Court adopted the same standard for the element of "severe emotional distress" in an IIED claim as required for a claim of negligent infliction of emotional distress:

"the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."

331 N.C. at 83, 414 S.E.2d at 27 (quoting *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)).

Here, plaintiff's complaint alleges that plaintiff "did in fact suffer severe emotional distress as a direct and proximate result of the actions of the defendants which first manifested themselves in diagnosable form

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following his acquittal for first degree murder” Defendant was acquitted in August 2009, within the three-year statute of limitations before plaintiff filed the complaint in November 2011. Because plaintiff’s cause of action could not accrue until he suffered severe emotional distress, and the complaint alleges that did not happen until after August 2009, this cause of action as to both defendants Thomas and Deaver is not barred by the statute of limitations. *See also Ruff v. Reeves Bros., Inc.*, 122 N.C. App. 221, 227, 468 S.E.2d 592, 597 (1996) (applying *Bryant* and holding that “plaintiff’s cause of action did not accrue until the actions of the defendant did, in fact, cause severe emotional distress”).

2. Failure to State a Claim for Relief

Defendants argue that plaintiff’s complaint fails to allege sufficient facts to show that defendants engaged in extreme and outrageous conduct, the first element of IIED. “[T]he initial determination of whether conduct is extreme and outrageous is a question of law for the court: ‘If the court determines that it may reasonably be so regarded, then it is for the jury to decide whether, under the facts of a particular case, defendants’ conduct . . . was in fact extreme and outrageous.’” *Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381-82 (1987) (quoting *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311 (1985)).

“‘Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’” *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872 (2005) (quoting *Guthrie v. Conroy*, 152 N.C. App. 15, 22, 567 S.E.2d 403, 408-09 (2002)). “[T]his Court has set a high threshold for a finding that conduct meets the standard.” *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev’d on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000). “‘The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’” *Briggs*, 73 N.C. App. at 677, 327 S.E.2d at 311 (quoting *Restatement (Second) of Torts* § 46 cmt. d.).

We believe that the allegations in the complaint in this case are similar to the facts of *West v. King’s Dep’t Store, Inc.*, 321 N.C. 698, 365 S.E.2d 621 (1988). In *West*, a store manager falsely accused the plaintiffs of stealing from his store, despite the plaintiffs producing a receipt of their purchase and verification from the cashier of the sale. *Id.* at 700-01, 365 S.E.2d at 622-23. In concluding that the evidence of the store manager’s conduct was sufficient to go to the jury on the claim of IIED, the

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Supreme Court cited favorably Judge Phillips' dissent from the majority opinion of this Court that

“[f]ew things are more outrageous and more calculated to inflict emotional distress on innocent store customers that have paid their good money for merchandise and have in hand a document to prove their purchase than for the seller or his agent, disdaining to even examine their receipt, to repeatedly tell them in a loud voice in the presence of others that they stole the merchandise and would be arrested if they did not return it.”

Id. at 705, 365 S.E.2d at 625 (quoting *West v. King's*, 86 N.C. App. 485, 358 S.E.2d 386 (1987) (Phillips, J., dissenting) (unpublished)).

Similarly, here, when viewed in the light most favorable to plaintiff, the complaint alleges facts showing that plaintiff's prosecution was highly publicized and he was accused of a crime he did not commit. While in *West*, the defendant refused to even look at evidence that would have established that the plaintiffs had not stolen anything, here, the allegations of the complaint, viewed in the light most favorable to plaintiff, allege that defendants Thomas and Deaver – public officers – essentially manufactured evidence to negate plaintiff's self defense claim by (1) performing unscientific tests designed to prove a theory that plaintiff's stab wounds were self-inflicted and the scene staged to look like self defense; (2) creating a second report supporting that theory that was inconsistent with his first report; (3) writing the second report in a manner that hid the existence of the first report by falsely suggested the second report was the result of examination of the evidence of four months earlier (when the first report was done) and by not indicating that the second report was an amendment or supplement to the first report; and (4) bolstering the theory by making false statements in the second report and in testimony regarding what the Sheriff's Office lead investigator had said. We believe that allegations that defendants falsely created evidence to establish guilt equates with the *West* defendant's refusal to look at evidence that would have exonerated the plaintiffs.

The Court in *West* also noted that the foreseeability of injury is a factor that goes to the outrageousness of a defendant's conduct. *Id.* It stands to reason that the more serious the crime of which someone is falsely accused and the more credible the accusers, the more foreseeable the mental anguish resulting therefrom. Here, the crime of which plaintiff was accused, first degree murder, is a much more serious offense than the crime of which the plaintiff in *West* was accused and

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the accusers – experienced special agents of the SBI – more credible to the public than the store manager in *West*. Therefore, the nature of the crime and the identity of the defendants in this case are factors that may be considered in assessing the outrageousness of defendants’ conduct.

Defendants, however, argue that plaintiff’s allegations do not differ substantially from the conduct in *Dobson*. In *Dobson*, a department store employee reported a customer to the Department of Social Services (“DSS”) for child abuse after the customer “yelled at the [15-month-old] child, picked her off the counter where she had been sitting, and set her back down hard.” 134 N.C. App. at 575, 521 S.E.2d at 713. The investigation against the customer was terminated when DSS was unable to substantiate the employee’s claims, and the customer sued the employee for IIED. *Id.* In holding that summary judgment was properly granted in favor of the defendant employee, this Court explained:

Assuming *arguendo* that defendant [employee] exaggerated or fabricated the events she reported to DSS, the report served only to initiate an investigatory process. Although falsely reporting child abuse wastes the limited resources available to DSS and subjects the reported parent to questioning and investigation, in light of this Court’s precedent, we cannot say that such actions constitute “extreme and outrageous conduct” which is “utterly intolerable in a civilized community.”

Id. at 578-79, 521 S.E.2d at 715 (quoting *Briggs*, 73 N.C. App. at 677, 327 S.E.2d at 311).

In *Dobson*, the defendant was a private citizen whose false accusations of criminal conduct merely served to initiate an investigatory process. The defendant’s conduct in *Dobson* was not considered outrageous in part due to the existence of an independent investigatory process that served to protect the plaintiff from further proceedings based on false accusations. In contrast, here, defendants are agents of the SBI who have an official duty to investigate allegations of criminal conduct and discover the truth. They are the individuals who are supposed to be conducting the independent investigatory process that would protect plaintiff from false accusations. When those individuals generate unsupported accusations, then the accused – in this case, plaintiff – is subjected to public condemnation of him as a murderer and is not merely subjected to an investigation. As a result, defendants’ misconduct is more likely to result in the initiation or continuation

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of publicized criminal proceedings than false accusations by private citizens. Thus, we believe that defendants' status as SBI agents distinguishes this case from *Dobson*.

While not binding authority, we note that other jurisdictions have found that similar conduct by police officers could be found by a reasonable jury to be sufficiently outrageous to support an IIED claim. *See Limone v. United States*, 579 F.3d 79, 99 (1st Cir. 2009) (conclusion that FBI engaged in extreme and outrageous conduct supported by findings that FBI knew that "scapegoats" were not involved in murder "from the moment that [an informant] implicated them" and that "FBI agents nonetheless assisted [the informant] in embellishing his apocryphal tale, helped him to sell that tale to state authorities and the jury, and covered up their perfidy by stonewalling the scapegoats' petitions for post-conviction relief."); *Pitt v. District of Columbia*, 491 F.3d 494, 506 (D.C. Cir. 2007) (evidence that police officer's arrest affidavit omitted exculpatory evidence and contained at least one false statement, and evidence that one officer tampered with evidence in attempt to link plaintiff to crime supported conclusion by reasonable juror that conduct was sufficiently "outrageous" for IIED claim); *Wagenmann v. Adams*, 829 F.2d 196, 214 (1st Cir. 1987) (holding that where evidence could support inference that officers conspired to arrest plaintiff and have him committed and were "determined to accomplish this objective at all costs and by the nearest means, in manifest derogation of the appellee's civil rights," trial court properly denied motion for judgment notwithstanding the verdict on IIED claim).

We find the reasoning in these cases persuasive and consistent with the analysis North Carolina courts have applied. Accordingly, we hold that plaintiff's complaint sufficiently alleges outrageous conduct and reverse the trial court's dismissal of plaintiff's claim of IIED.

D. False Imprisonment

False imprisonment is "the illegal restraint of a person against his will." *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (quoting *Marlowe v. Piner*, 119 N.C. App. 125, 129, 458 S.E.2d 220, 223 (1995)). "A false arrest is an arrest without legal authority and is one means of committing a false imprisonment." *Marlowe*, 119 N.C. App. at 129, 458 S.E.2d 220 at 223.

Plaintiff contends that his release on house arrest constituted false imprisonment. We disagree. As explained by the Supreme Court of the United States:

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False arrest and false imprisonment overlap; the former is a species of the latter. Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets; and when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is. We shall thus refer to the two torts together as false imprisonment. That tort provides the proper analogy to the cause of action asserted against the present respondents for the following reason: The sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*[.]

....

Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held *pursuant to such process* – when, for example, he is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of the damages for the entirely distinct tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process.

Wallace v. Kato, 549 U.S. 384, 388-90, 166 L. Ed. 2d 973, 980-81, 127 S. Ct. 1091, 1095-96 (2007) (internal citations and quotation marks omitted).

Plaintiff's complaint alleges that he was arrested only after being indicted by a grand jury. He was then released on house arrest. Plaintiff's complaint fails to allege that he was confined without legal process or other legal authority. While plaintiff's allegation that his detention and house arrest were not supported by probable cause is sufficient to state a claim for malicious prosecution, plaintiff has not, on appeal, cited any authority that would allow him to also proceed with a false imprisonment claim. Accordingly, we affirm the dismissal of this claim.

E. Public Official Immunity

Public officials sued in their individual capacity are entitled to public official immunity from claims in tort unless their "conduct is malicious, corrupt, or outside the scope of official authority." *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 852 (1996). "[I]f a plaintiff wishes to sue a public official in his personal or individual capacity, the

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plaintiff must, at the pleading stage and thereafter, demonstrate that the official's actions (under color of authority) are commensurate with one of the 'piercing' exceptions." *Id.* at 207, 468 S.E.2d at 853. To withstand a defendant's motion to dismiss a claim based on the defense of public official immunity, the facts alleged in the complaint must support a conclusion that one of the piercing exceptions apply. *Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997).

Here, plaintiff's complaint alleges that defendants' conduct was willful, intentional, and malicious. As previously discussed, the facts alleged support an inference that defendants acted maliciously. Therefore, to the extent the trial court dismissed the complaint based on public official immunity with respect to the malicious prosecution and IIED claims, the trial court erred.

II. Federal Constitutional Claims

Plaintiff argues that his complaint adequately alleged facts to support a § 1983 claim for malicious prosecution against defendants Thomas, Deaver, and Pendergraft in their individual capacities. Plaintiff apparently bases the § 1983 claim upon a violation of plaintiff's Fourth Amendment right to be free from unreasonable seizure, but otherwise makes no attempt to distinguish the § 1983 malicious prosecution claim from the state law malicious prosecution claim. Defendants argue, however, that they are entitled to qualified immunity for this claim and that the trial court properly dismissed the claim on this basis.

"The defense of qualified immunity shields government officials from personal liability under § 1983 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Toomer v. Garrett*, 155 N.C. App. 462, 473, 574 S.E.2d 76, 86 (2002) (quoting *Andrews v. Crump*, 144 N.C. App. 68, 75-76, 547 S.E.2d 117, 122 (2001)). "The qualified immunity inquiry requires a determination of whether the right at issue was clearly established at the time it was allegedly violated." *Id.* at 474, 574 S.E.2d at 87.

On appeal, plaintiff makes no argument that defendants violated a clearly established constitutional right. Rather, plaintiff, citing only *Epps v. Duke Univ., Inc.*, 116 N.C. App. 305, 447 S.E.2d 444 (1994), confuses the doctrine of qualified immunity with the doctrine of public official immunity, arguing generally that because "[u]nder the facts alleged, the Defendants could not have acted in good faith[.]" neither immunity defense is available to defendants at this stage of the proceeding.

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Plaintiff, therefore, does not make any relevant argument or cite any authority in support of his assertion that defendants are not entitled to qualified immunity for the § 1983 malicious prosecution claim. “Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.” N.C.R. App. P. 28(b)(6). Accordingly, we affirm the trial court’s dismissal of plaintiff’s § 1983 claims.

Conclusion

In sum, we reverse the trial court’s dismissal of plaintiff’s state law malicious prosecution and IIED claims, as neither of those claims are barred by the statute of limitations or public official immunity and the allegations of the complaint are legally sufficient to state a claim for relief. As to the remaining claims, we affirm.

Affirmed in part; reversed in part.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

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[235 N.C. App. 541 (2014)]

SAMUEL AND DORIS FORT, JULIA KATHERINE FAIRCLOTH,
RAEFORD B. LOCKAMY, II, OK FARMS OF CEDAR CREEK, LLC, AND
ARNOLD DREW SMITH, PETITIONERS
v.
COUNTY OF CUMBERLAND, NORTH CAROLINA,
AND TIGERSWAN, INC., RESPONDENTS

No. COA14-93

Filed 19 August 2014

1. Zoning—de novo review—vocational school—outdoor firing range—use by right

The trial court erred as a matter of law in a zoning case by concluding that respondent's facility was a vocational school pursuant to the zoning ordinance. Furthermore, the trial court erred by failing to affirm the determination of the Cumberland County's Board of Adjustment that the facility was an outdoor firing range, allowed as a use by right.

2. Zoning—whole record review—land use impacts—recreation/amusement classification

The trial court erred in a zoning case by concluding that there was "no competent evidence" that could support the Cumberland County Board of Adjustment's determination that respondent's facility's land use impacts were most similar to the recreation/amusement classification.

Appeal by respondents from order entered 23 October 2013 by Judge C. Winston Gilchrist in Cumberland County Superior Court. Heard in the Court of Appeals 4 June 2014.

Currin & Currin, by Robin T. Currin and George B. Currin, for petitioners.

Cumberland County Attorney's Office, by Robert A. Hasty, Jr., for respondent-appellant County of Cumberland.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker, for respondent-appellant TigerSwan, Inc.

McCULLOUGH, Judge.

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Respondents TigerSwan, Inc., and Cumberland County appeal an order of the trial court, reversing a decision made by Cumberland County's Board of Adjustment that the TigerSwan facility is permitted in the A1 Zoning District and remanding with instructions to revoke the site plan approval and zoning permit for the TigerSwan facility. Based on the reasons stated herein, we reverse the order of the trial court.

I. Background

The Cumberland County zoning ordinance at issue in this appeal was originally adopted on 3 July 1972, revised 20 June 2005, and amended on 18 April 2011 ("the zoning ordinance"). Article IV, Section 402, entitled "Uses by Right" provides as follows:

All uses of property are allowed as a use by right except where this ordinance specifies otherwise or where this ordinance specifically prohibits the use. In the event, a use of property is proposed that is not addressed by the terms of this ordinance, the minimum ordinance standards for the use addressed by this ordinance that is most closely related to the land use impacts of the proposed use shall apply.

Article IV, Section 403 of the zoning ordinance includes a "Use Matrix" which enumerates permitted and special land uses, as well as some land uses allowed only in a conditional zoning district. The following land uses are enumerated in the "Use Matrix" and are pertinent to the case before us: "RECREATION/AMUS[E]MENT OUTDOOR (with mechanized vehicle operations) conducted outside building for profit, not otherwise listed & not regulated by Sec. 924" ("recreation/amusement") which is a permitted use in the A1 zoning district; "SCHOOLS, public, private, elementary or secondary" ("public or private school") which is a permitted use in the A1 zoning district; and a "SCHOOL, business and commercial for nurses or other medically oriented professions, trade, vocational & fine arts" ("vocational school") which is not a permitted use in the A1 zoning district.

TigerSwan, Inc. ("TigerSwan") submitted a site plan application to the County of Cumberland ("County") requesting approval for a "Training Collaboration Center" ("the TigerSwan facility"). The TigerSwan facility leases a 978 acre site which sits on a 1,521 acre parcel. The entire site is located in the A1 Agricultural District of the County. Evidence in the record established that the TigerSwan facility would be designed to provide weapons training and firearm safety primarily to the government, military, law enforcement, and corporate organizations. One day a week,

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the TigerSwan facility would be open to the public. Ninety-five (95%) percent of the activity at the TigerSwan facility would occur on the outdoor gun ranges. TigerSwan intends to have a pro-shop, buildings for instruction, administrative offices, and restrooms.

On 9 April 2012, the County's Planning and Inspections Department ("the Planning Department") issued a site plan approval for the TigerSwan facility. The Planning Department held that the TigerSwan facility was permitted as a recreation/amusement land use. The Planning Department also issued a zoning permit to TigerSwan on 17 April 2012.

Petitioners Samuel and Doris Fort, Julia Katherine Faircloth, Raeford B. Lockamy, II, OK Farms of Cedar Creek, LLC, and Arnold Drew Smith appealed the issuance of the permit to the Cumberland County Board of Adjustment ("the Board"). Specifically, petitioners challenged the approval of the TigerSwan facility by arguing that the County's zoning administrator's classification of the TigerSwan facility as a recreation/amusement land use was erroneous. Petitioners argued that the County had never taken the position that the TigerSwan facility be permitted as recreation/amusement and that the Planning Department's determination was in direct conflict with the County's previous position, as set forth in *Fort v. County of Cumberland*, __ N.C. App. __, 721 S.E.2d 350 (2012) ("*Fort*"), that the TigerSwan facility be classified as a "private school."

Petitioners relied on our Court's holding in *Fort*. In *Fort*, TigerSwan sought approval of a "firearms training facility." *Id.* at __, 721 S.E.2d at 352. Our Court found that TigerSwan

[i]ntendstoprovideinstructiontomilitary,lawenforcement, and security personnel in topics such as weapons training, urban warfare, convoy security operations, and "[w]arrior [c]ombatives" in order to "teach, coach, and mentor tomorrow's soldiers." TigerSwan also intends to provide courses on topics such as first aid, firearm and hunting safety, and foreign languages for adults and children.

Id. The site plan included multiple firing ranges in addition to classroom facilities. *Id.* The Cumberland County zoning administrator approved TigerSwan's site plan by classifying the business as a "private school." *Id.* Petitioners Samuel and Doris Fort, Julia Katherine Faircloth, and Raeford B. Lockamy, II, appealed the approval of the site plan and the Board affirmed the decision of the zoning administrator. *Id.* at __, 721 S.E.2d at 352-53. After the *Fort* petitioners appealed to the superior

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court, the trial court held that the training facility was a permitted use in the A1 zoning district. *Id.* at __, 721 S.E.2d at 353. The *Fort* petitioners appealed to our Court. Under section 402 of the then-existing zoning ordinance¹, our Court held that the TigerSwan facility was not a “private school” and that the TigerSwan facility was not a permitted use in the A1 zoning district. *Id.* at __, 721 S.E.2d 354. Using rules of statutory construction, our Court reasoned that the “schools, public, private, elementary or secondary” category in the zoning ordinance limited permissible schools, private and public, to elementary and secondary education. “[T]he inclusion of ‘elementary or secondary’ in the description of permissible schools was intended to exclude other types of ‘SCHOOLS,’ whether they be private or public.” *Id.* at __, 721 S.E.2d at 355. Our Court stated that “[w]ithout deciding whether the Training Facility qualifies as either a trade or vocational school, we conclude that the Training Facility is not a permitted use as it is not a public or private, elementary or secondary school.” *Id.*

On 10 July 2012, the Board held a hearing on the issue of whether “the staff of the Cumberland County Planning Department erred by failing to classify the use of the site for the [TigerSwan facility] as a vocational school within one of the School land uses.” The Board entered an order that made the following pertinent findings:

3. The training offered at the TigerSwan facility is in the nature of skill level improvement.
4. Approximately 80-90% of the activities conducted at the TigerSwan facility occur outside on the firing ranges, and the training conducted in the meeting rooms is incidental to the firing of pistols and rifles. Twenty percent (20%) of the activity at the TigerSwan facility is recreational in nature and involves sportsmen and families.

....

7. There is no classification of firing ranges in the Cumberland County Zoning Ordinance.

1. This case was decided under the version of the ordinance prior to the 18 April 2011 amendment: Section 402 entitled, “Uses by Right” provided that “[a]ll uses of property are prohibited except those that are permitted or otherwise allowed under the terms of this ordinance.”

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. . . .

10. Before the submission of the request for a permit for the TigerSwan facility, Planning Director Tom Lloyd issued a directive to staff that any outdoor firing range would be considered as the classified use [recreation/amusement] for the reason that he believed this was the classified use under the ordinance which created the most similar land use impacts.
11. The Planning Department classified the TigerSwan facility in accordance with the Planning Director's directive and issued the subject permit. . . .

The Board concluded that the TigerSwan facility did not fall within the classification of a vocational school. The Board also concluded that the decision of the Planning Department "to consider the TigerSwan facility to be an outdoor firing range most similar to the classified use for outdoor recreation[/amusement] was reasonable and was made in conformance with the provision" of the zoning ordinance. The Board dismissed petitioners' appeal and affirmed the issuance of the permit for the TigerSwan facility.

Petitioners then appealed the order of the Board to the Cumberland County Superior Court by filing a petition for writ of certiorari on 25 September 2012.

Following a hearing held at the 26 August 2013 session of Cumberland County Superior Court on petitioners' writ of certiorari, the trial court entered an order on 23 October 2013. The trial court found that the Board's decision "must be reversed and the case remanded to the Board . . . with instructions to revoke the Site Plan and Zoning Permit for the TigerSwan Facility issued on April 9, 2012 and April 17, 2012." The trial court's decision was based on the following, in pertinent part:

4. In its Table of Permitted Uses, the Zoning Ordinance sets forth the uses that are allowed in the A1 District and those which are not. [Vocational schools] are not permitted in the A1 District. The term vocational school is not defined in the Zoning Ordinance.
5. [Recreation/Amusement] is a permitted use in the A1 District. . . .
6. The Zoning Ordinance in effect at the time of the approvals by the Zoning Administrator (the "Zoning

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Ordinance”) does not reference a use called a “firing range” or “shooting range,” and neither of those terms are defined in the Zoning Ordinance.

....

8. The decisions to approve the Site Plan and Zoning Permit were based upon the Zoning Administrator’s determination that the TigerSwan Facility was an outdoor firing range, which is not addressed by the Zoning Ordinance. The Zoning Administrator then determined, pursuant to Zoning Ordinance Section 402, that the TigerSwan Facility should be regulated as [recreation/amusement] because the land use impacts of the TigerSwan Facility were most closely related to that use.

....

13. Based on the Court’s de novo review of the whole record . . . this Court concludes that the TigerSwan Facility is a [vocational school], as set out in the Zoning Ordinance and is, therefore, prohibited in the A1 District. The evidence in the Record established that the TigerSwan Facility fits within the definition of a vocational school and its purposes and activities are consistent with those of a vocational school as set out in the Zoning Ordinance. The Board of Adjustment, thus, erred in affirming the decision of the Zoning Administrator which determined the TigerSwan Facility was an outdoor firing range, because it is not. The TigerSwan Facility is a vocational school under the Zoning Ordinance. The fact that TigerSwan operates a recreational firing range one day a week and uses a firing range for its courses does not change the nature of the use, which the Record establishes is to provide instruction to military, law enforcement and security personnel for use in their occupations. See Fort v. County of Cumberland, __ N.C. App. __, __, 721 S.E.2d 350, 356 (2012) (while some uses offered by TigerSwan may be permitted, “the inclusion of permitted uses cannot offset the uses prohibited by the [Zoning] Ordinance.”).

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14. Because the TigerSwan Facility is a vocational school, which is a use that is specifically prohibited in the A1 District, the Zoning Administrator had no authority under the Zoning Ordinance Section 402 to determine that the TigerSwan Facility should be regulated according to the minimum standards for the use with the most closely related land use impacts. Regardless, however, and in the alternative, there was no competent evidence in the Record that could support the determination that the TigerSwan Facility's impacts were most similar to [Recreation/Amusement].

Respondents County of Cumberland and TigerSwan filed notice of appeal on 15 November 2013 from the 23 October 2013 order of the trial court.

II. Standard of Review

It is well established that “[j]udicial review of the decisions of a municipal board of adjustment is authorized by N.C. Gen. Stat. § 160A-388(e2), which provides, in pertinent part, that ‘[e]very decision of the board shall be subject to review by the superior court by proceedings in the nature of *certiorari*.’” *Four Seasons Mgmt. Servs. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010). Upon review of a decision from a Board of Adjustment, the trial court should:

- (1) review the record for errors of law, (2) ensure that procedures specified by law in both statute and ordinance are followed, (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents, (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record, and (5) ensure that the decision is not arbitrary and capricious.

CRLP Durham, LP v. Durham City/County Bd. of Adjustment, 210 N.C. App. 203, 207, 706 S.E.2d 317, 319-320 (2011) (citations and quotation marks omitted).

“If a petitioner contends the Board’s decision was based on an error of law, *de novo* review is proper.” *Four Seasons*, 205 N.C. App. at 75, 695 S.E.2d at 462 (citations and quotation marks omitted). “Under *de novo* review a reviewing court considers the case anew and may

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freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris Communs. Corp v. City of Bessemer*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (citation omitted). "However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test." *Four Seasons*, 205 N.C. App. at 75, 695 S.E.2d at 462 (citations omitted). "When utilizing the whole record test, . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Templeton Properties v. Town of Boone*, __ N.C. App. __, __, __ S.E.2d __, __ (June 3, 2014) (No. COA13-1274).

"When this Court reviews a superior court's order which reviewed a zoning board's decision, we examine the order to: (1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly." *CRLP Durham*, 210 N.C. App. at 207, 706 S.E.2d at 320 (citation omitted).

III. Discussion

On appeal, respondents argue that the trial court erred by (A) concluding, in paragraphs 13 and 14 of the 23 October 2013 order, that TigerSwan's facility is a vocational school as set out in the zoning ordinance and by (B) concluding in paragraph 14 that there was no competent evidence in the record that could support the determination that the TigerSwan facility's impacts were most similar to the category of recreation/amusement.

A. Classification of the TigerSwan Facility as a Vocational School

[1] First, respondents argue that the trial court erred as a matter of law by concluding that the TigerSwan facility was a vocational school pursuant to the zoning ordinance. Respondents also contend that the trial court erred by failing to affirm the determination of the Board that the TigerSwan facility was an outdoor firing range, allowed as a use by right.

"The superior court reviews a board of adjustment's interpretation of a municipal ordinance *de novo*." *MNC Holdings, LLC v. Town of Matthews*, __ N.C. App. __, __, 735 S.E.2d 364, 367 (2012). Reviewing the trial court's 23 October 2013 order, we initially note that the trial court, while reviewing issues involving the interpretation of the zoning ordinance, employed the appropriate *de novo* standard of review. The issue in this appeal is whether the trial court's legal interpretation of the zoning ordinance was correct. Accordingly, we also employ

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de novo review and “consider [the] question[s] anew.” *JWL Invs., Inc. v. Guilford County Bd. of Adjustment*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 718 (1999). See *MNC Holdings*, __ N.C. App. at __, 735 S.E.2d at 367 (stating that because the issue on appeal is whether the trial court’s legal interpretation of a municipal ordinance is correct, our Court also employs a *de novo* review).

In determining the meaning of a zoning ordinance, we apply the same principles of construction used to interpret statutes. See *Morris*, 365 N.C. at 157, 712 S.E.2d at 872. In addition,

we attempt to ascertain and effectuate the intent of the legislative body. Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. In addition, we avoid interpretations that create absurd or illogical results.

Ayers v. Bd. of Adjustment, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994) (citations omitted). “[R]eviewing courts may make independent assessments of the underlying merits of board of adjustment ordinance interpretations. This proposition emphasizes the obvious corollary that courts consider, but are not bound by, the interpretations of administrative agencies and boards.” *Morris*, 365 N.C. at 156, 712 S.E.2d at 871 (citations and quotation marks omitted).

We first examine the intent of the zoning ordinance. Prior to the 18 April 2011 amendment, the zoning ordinance provided that “[a]ll uses of property are prohibited except those that are permitted or otherwise allowed under the terms of this ordinance.” Notably, following the 18 April 2011 amendment, the zoning ordinance provided in Section 402 that “[a]ll uses of property are allowed as a use by right except where this ordinance specifies otherwise or where this ordinance specifically prohibits the use.” In determining the intent of the 18 April 2011 amendment, it is evident that the legislative body intended to broaden the spectrum of permissible uses and thereby, freely allowed the use of property except where it was specifically prohibited.

We now consider the term “vocational school” and the Board’s interpretation of that term. The term “vocational school” is not defined in the zoning ordinance. “In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a[n] ordinance.” *Perkins v. Arkansas Trucking Servs.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citation omitted). “Vocational” is defined as “of, relating to, or concerned with a vocation” or “of, relating

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to, or undergoing training in a skill or trade to be pursued as a career.” *Merriam-Webster Online Dictionary*.²

Despite the lack of a definition within the zoning ordinance, the Board interpreted the term “vocational school” to mean the following:

The commonly accepted concept or definition of a vocational school is an institution like Fayetteville Technical Community College where students gain career training through extended courses in classrooms. Vocational schools can have hundreds or thousands of students coming by car to the school each day. The TigerSwan facility has just a limited number of cars each day.

The Board also found that the training offered at the TigerSwan facility was in the nature of “skill level improvement” – eighty to ninety (80 – 90%) percent of the activities conducted at the TigerSwan facility occurred outside on the firing ranges and that the training conducted inside the meeting rooms was incidental to the firing of pistols and rifles. Based on the foregoing, the Board concluded that the TigerSwan facility did not fall within the “vocational school” classification of the zoning ordinance.

Considering the plain and ordinary meaning of the term “vocational” school within the zoning ordinance, in light of the intent of the ordinance, we hold that the Board’s determination that the TigerSwan facility did not constitute a vocational school was proper. Uncontested evidence presented before the Board on 10 July 2012 included testimony from Brian Searcy, the Chief Operating Officer for TigerSwan, that ninety-five percent (95%) of “everything that occurs on this facility is range fire, outdoors.” Searcy testified that eighty percent (80%) of training is provided to military personnel, law enforcement, and private security contractors “[t]o improve their current skills that they have[.]” One day a week, the firing range is opened to the public for recreational shooters. Significantly, Searcy explained that “[TigerSwan] do[es] not qualify people to do jobs, [does not] give diplomas and [does not] give any degrees. We give a certificate of training to people who attend two or three day courses. All we’re doing is helping improve skills that they already have.” Searcy agreed that at the TigerSwan facility, people are “just practicing a skill which is firing a weapon[.]” Steve Swierkowski, who coordinates the training events that take place at TigerSwan,

2. <http://www.merriam-webster.com/dictionary/>

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testified that “the majority of the activities takes place on the range” and that “we can execute this range without the use of any classrooms.”

Because the TigerSwan facility does not teach a skill or trade to be pursued as a career, but rather, provides training to existing members of a profession in order to practice and refine their already-existing skills, we agree with the Board’s conclusion that the training offered at the TigerSwan facility is in the nature of skill level improvement. The TigerSwan facility operates as a firing range, and not as a vocational school, where students gain career training through extended courses in classrooms and receive diplomas or degrees so that they are able to pursue a career. Furthermore, because the zoning ordinance fails to specifically prohibit the use of land as a firing range, it is allowed as a use by right pursuant to Section 402. Based on the foregoing reasons, we hold that the trial court improperly applied *de novo* review of the Board’s decision and thus, erred by reversing the Board’s conclusion that the TigerSwan facility does not fall within the classification of a vocational school.

**B. Evidence of the TigerSwan Facility as a
Recreation/Amusement Land Use**

[2] Next, respondents challenge the trial court’s conclusion that “in the alternative, there was no competent evidence in the Record that could support the determination that the TigerSwan Facility’s impacts were most similar to [recreation/amusement].” Respondents argue that there was competent evidence in the record to refute this conclusion.

Because the trial court was reviewing whether the Board’s decision that the TigerSwan facility’s impacts were most similar to recreation/amusement, it should have applied the whole record test. It is well established that “[w]hile the county board operates as the finder of fact, a reviewing superior court sits in the posture of an appellate court and does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board.” *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 12-13, 565 S.E.2d 9, 17 (2002) (citation and quotation marks omitted). “[I]f in applying the whole record test, reasonable but conflicted views emerge from the evidence, this court cannot substitute its judgment for the administrative body’s decision. Ultimately, we must decide whether the decision has a rational basis in the evidence.” *Appalachian Outdoor Adver. Co. v. Town of Boone Bd. of Adjustment*, 128 N.C. App. 137, 141, 493 S.E.2d 789, 792 (1997) (citations and quotation marks omitted).

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After thoughtful review, we hold that although the trial court's 23 October 2013 order indicates that it conducted review under the whole record test, it failed to do so properly.

A recreation/amusement land use is defined within the zoning ordinance as follows:

An area or establishment, which requires the use of motors or engines for the operation of equipment or participation in the activity. This definition includes but is not limited to go-cart tracks, bicycle motorcross (BMX) courses and the like. This definition does not include golf courses (golf carts) or other low impact motorized activities or vehicles.

At the 10 July 2012 hearing before the Board, testimony was offered by Thomas J. Lloyd, director of the Planning Department. Mr. Lloyd testified that he had issued a memorandum dated 21 February 2012 wherein he had made a determination that the TigerSwan facility was a firing range, with the most similar land use impacts of recreation/amusement. Mr. Lloyd, explaining the analysis behind his determination, testified to the following:

MR. LLOYD: We looked at the affects [sic] of a firing range and noted what would be the biggest objection or the biggest problem with respect to health, safety and welfare to neighboring properties and of course that would be any projectile leaving the firing range site. Of course there are other aspects too including noise, lighting and traffic volume. But most of all we had to look at the safety of the surrounding property. When you look at outdoor recreation it addresses safety specifically Section 920F which talks about fencing, netting and other control measures and many times with firing ranges, the use permit, shall be provided around the perimeter of any areas used for hitting, flying, or throwing of objects to prevent the object from leaving the designated area. The only thing we had in the ordinance that addressed objects of any kind leaving the site or leaving the area was outdoor recreation. With respect to that and that measure of any projectile on a firing range leaving the area as well as the less impact of lighting and noise, they were also similarly addressed in outdoor recreation.

MR. FLOWERS: Just so we are clear on this, when you issued that memo on February 21, 2012, you were not

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saying that a firing range is outdoor recreation but that the impact is similar to outdoor recreation, is that right?

MR. LLOYD: Yes sir, which is exactly the way the ordinance amendment in Section 402 read.

Based on the foregoing evidence presented to the Board, we hold that the trial court erred by concluding that there was “no competent evidence” that could support the determination that the TigerSwan facility’s land use impacts were most similar to the recreation/amusement classification. “It is neither the superior court’s nor this Court’s duty to second guess the decision of [the Board] where there is a rational basis in the evidence.” *Myers Park Homeowners Ass’n., Inc. v. City of Charlotte*, __ N.C. App __, __, 747 S.E.2d 338, 344 (2013).

IV. Conclusion

We hold that the Board properly approved the TigerSwan facility as a firing range with the land use impacts most similar to the recreation/amusement classification. Accordingly, because the trial court improperly reversed the decision of the Board, we reverse the order of the trial court.

Reversed.

Judges STEPHENS and STROUD concur.

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[235 N.C. App. 554 (2014)]

TAMI L. GRAY, PLAINTIFF

v.

DARRELL KEITH PEELE, DEFENDANT

No. COA13-1333

Filed 19 August 2014

Appeal and Error—interlocutory orders and appeals—temporary child support order

Defendant's appeal from the trial court's order denying his motion to modify child support was dismissed as interlocutory. The temporary order provided for payment of child support until a pending motion to modify custody could be determined and child support set based upon the actual custodial schedule.

Appeal by defendant from order entered 9 August 2013 by Judge Daniel J. Nagle in Wake County District Court. Heard in the Court of Appeals 22 May 2014.

No brief filed on behalf of plaintiff-appellee.

Elisabeth P. Clary for intervenor plaintiff-appellee Wake County Child Support Enforcement.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Darrell Keith Peele ("Defendant") appeals from an order denying his motion to modify child support. Defendant contends that the prior child support order entered in 2010 was temporary in nature and that the trial court erred in requiring him to demonstrate that a substantial change in circumstances had taken place since the entry of the existing order. Defendant also challenges the trial court's conclusions and findings of fact. For the following reasons, we dismiss the appeal as interlocutory.

I. Factual & Procedural History

Tami L. Gray ("Plaintiff") and Defendant were married on 30 April 1994. During the marriage, Plaintiff and Defendant had one child, L.K.P., who was born in March 1999. Plaintiff and Defendant subsequently divorced.

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On 24 October 2000, the Granville County District Court entered a temporary child support order that, pursuant to the North Carolina Child Support Guidelines, required Defendant to pay the presumptive sum of \$685.57 per month for the minor child. On 17 April 2001, when the child was 2 years old, the court entered a permanent custody order giving Plaintiff primary physical custody of L.K.P. and Defendant Wednesday evening, alternating weekend, and holiday visitation rights. The custody order also provided that “[t]he parties may exercise such other and further residency periods with the minor child as may be mutually agreed upon by the parties.”

On 21 February 2003, the court modified the temporary child support order, requiring Defendant to pay \$685.57 per month in accordance with the previous child support order, plus an additional \$100 per month towards arrearages. Nearly five years later, in February 2008, the action was transferred to Wake County and an order was entered permitting the local Child Support Enforcement Agency to intervene on behalf of Plaintiff.

Thereafter, on 4 May 2010, Defendant filed a motion to modify his child support obligation, citing loss of work and unemployment, as well as the fact that L.K.P. had been staying with him an additional night during the week. Following a hearing on the motion, the trial court entered an order on 6 August 2010 based on a consent agreement between the parties reducing Defendant’s monthly child support obligation to \$500 per month.

On 10 October 2010, the parties mutually agreed to implement a week-on/week-off custody arrangement, although the custody order was not formally modified. After the parties implemented this agreement, Defendant stopped paying child support without seeking a modification from the trial court and without Plaintiff’s consent. On 31 August 2011, Plaintiff withdrew from the agreement and demanded that Defendant revert to the custody schedule contained in the 17 April 2001 custody order. Despite Plaintiff’s objections, however, the record evidence shows that the parties continued the week-on/week-off custody arrangement until the hearing in this matter in May of 2013 – a period of over 2 years and seven months. On 27 September 2011, Defendant filed a motion to modify custody alleging the existence of many changes in the parties’ circumstances and the child’s needs, requesting an award of primary custody or in the alternative, that the “Court modify the 2001 Custody Order such that the parties immediately resume and maintain the week-on week-off custodial schedule that they have been operating under for the past year.” This motion remains pending in the trial court.

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Thereafter, Defendant filed a separate motion to modify child support on 10 April 2012 and again on 31 January 2013, alleging that circumstances had changed in that he had experienced a period of unemployment, his home had been foreclosed upon, his car had been repossessed, and his financial condition had deteriorated. Defendant also cited the week-on/week-off custody schedule in the motion. Defendant's motion to modify child support was heard at the 24 May 2013 "term of Wake County Civil IV-D District Court." Following a hearing concerning the motion to modify child support only, the trial court entered an order dated 9 August 2013 concluding, *inter alia*, that:

2. Defendant earns income on a monthly basis and is capable of contributing to the support of the minor child, [L.K.P].
3. Defendant should be required to pay child support for the minor child, [L.K.P].
4. A change in the physical custody of a child constitutes a substantial change in circumstances warranting modification of an existing child support order.
5. While a change in the physical custody of the minor child existed from to [sic] 10 October 2010 to 31 August 2011, the defendant failed to file a motion to modify child support and was not precluded from filing by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason, and the change in physical custody no longer exists and payment has vested.
6. The existing ordered support amount is sufficient to meet the reasonable needs of the minor child.

(Internal citation omitted). Accordingly, the trial court denied Defendant's motion to modify child support and ordered Defendant to continue to make child support payments of \$500 per month as previously ordered. Defendant filed timely notice of appeal from the trial court's order.

II. Jurisdiction

Defendant argues that we have jurisdiction to consider this order because it is not interlocutory. We disagree.

Generally, there is no right of immediate appeal from interlocutory orders and judgments. An interlocutory order is one made during the pendency of an action, which does

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not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. On the other hand, a final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.

Hausle v. Hausle, ___ N.C. App. ___, ___, 739 S.E.2d 203, 205-06 (2013) (citations, quotation marks, and brackets omitted). “The reason for this rule is to prevent fragmentary, premature, and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.” *Peters v. Peters*, ___ N.C. App. ___, ___, 754 S.E.2d 437, 439 (2014) (citation, quotation marks, and brackets omitted). “In the child support context, an order setting child support is not a final order for purposes of appeal until no further action is necessary before the trial court upon the motion or pleading then being considered.” *Banner v. Hatcher*, 124 N.C. App. 439, 441, 477 S.E.2d 249, 250 (1996).

In the literal sense of the word, no child support order entered in this state is “permanent” because it “may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances[.]” N.C. Gen. Stat. § 50-13.7(a) (2013). Nevertheless, our case law provides that a child support order may be characterized as “permanent” when the order is based on the merits of the case and intended to be final. *See Miller v. Miller*, 153 N.C. App. 40, 47-48, 568 S.E.2d 914, 919 (2002).

With respect to child custody orders, we have said that “[a] temporary order is not designed to remain in effect for extensive periods of time or indefinitely.” *Gary v. Bright*, ___ N.C. App. ___, ___, 750 S.E.2d 912, 915 (2013) (internal quotation marks and citation omitted).

[A]n order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief[;] or (3) the order does not determine all the issues. If the order does not meet any of these criteria, it is permanent.

Woodring v. Woodring, ___ N.C. App. ___, ___, 745 S.E.2d 13, 18 (2013) (alterations in original) (internal quotation marks and citation omitted).

With respect to child support orders, our case law is less developed, but not totally devoid of guiding precedent. *See, e.g., Miller*, 153 N.C. App. 40, 568 S.E.2d 914; *Cole v. Cole*, 149 N.C. App. 427, 562 S.E.2d 11

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(2002); *Banner*, 124 N.C. App. 439, 477 S.E.2d 249. In these cases, we have looked to the intent behind the trial court's order to determine if a support order is temporary. In doing so, we have considered whether the order explicitly identifies itself as a temporary order and whether the language of the order contemplates that another "permanent" order will be entered at a future point in time. *Miller*, 153 N.C. App. at 47-48, 568 S.E.2d at 919; *Cole*, 149 N.C. App. at 433-44, 562 S.E.2d at 14-15.

A claim for either child support or custody can be brought and heard by the trial court independently, so in one sense, a final determination of one claim would be entirely separate of the other. But in many cases, and this is one of them, the amount of child support depends in large part upon the custodial schedule and the custodial schedule is in dispute. In fact, N.C. Gen. Stat. § 50-13.4 establishes child support guidelines which are based upon the applicable custodial schedule and a presumption that child support shall be set in accordance with the guidelines unless the parties' incomes place their case outside of the guidelines or there is a request for deviation from the guidelines and the trial court makes findings that a deviation is justified in the particular case. *See generally Pataky v. Pataky*, 160 N.C. App. 289, 295-96, 585 S.E.2d 404, 408-09 (2003) (discussing in detail the origins of and procedures applicable to the child support guidelines), *aff'd in part and disc. rev. dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004); N.C. Gen. Stat. § 50-13.4(c), (c1).

This statutory scheme and the presumption of application of the guidelines makes the claims of child custody and child support legally interdependent. Here, there is a pending motion to modify custody which, if allowed, would fundamentally alter the facts upon which the trial court based its child support decision. After entry of the 6 August 2010 child support order, the parties agreed that the minor child would live with each party during alternate weeks, and the evidence indicated that this living arrangement continued up to the time of the hearing in May of 2013. Although plaintiff "withdrew her consent" from that arrangement on 31 August 2011, they continued to alternate custody weekly. On 27 September 2011, defendant moved to modify the parties' custody order to reflect the new arrangement. On 10 April 2012, defendant also moved to modify child support, alleging as part of the justification for this request the actual custodial arrangement the parties had been following. On 18 April 2013, defendant also filed notice that he would

request a deviation from the North Carolina Child Support Guidelines and requests the Court to consider the Defendant's deviation when applying the guidelines

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and to take into consideration the custodial schedule of the parties. The Defendant asserts that the Child Support Guidelines are unreasonable because the parties maintained a fifty/fifty (50/50) custodial schedule for the minor child since October 2010. Based upon information and belief, the Defendant believed the Order was in effect for a 50/50 schedule and has since discovered that the Custody Order may not have been signed and the Plaintiff and Defendant have exercised a 50/50 custody since October 2010.

The order on appeal only addressed the child support issues, while leaving the custody issues unresolved—nearly two years after defendant had moved to modify the custody order to reflect the actual custody schedule. We understand that the order failed to address child custody because this case was heard in Wake County Civil IV-D District Court and prosecuted by the Wake County Child Support Enforcement Agency on behalf of Plaintiff. The “Civil IV-D” session of District Court is commonly referred to as “child support court.” Chapter 110 of the North Carolina General Statutes sets out a comprehensive statutory scheme for establishment of child support orders and enforcement of those orders in cases which fall under that Chapter, defined as “a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV–D of the Social Security Act as amended and this Article.” N.C. Gen. Stat. § 110-129(7) (2011). N.C. Gen. Stat. § 110-129.1(a)(3) grants to the Department of Health and Human Services the “power and duty” to

Establish and implement procedures under which in IV-D cases either parent or, in the case of an assignment of support, the State may request that a child support order enforced under this Chapter be reviewed and, if appropriate, adjusted in accordance with the most recently adopted uniform statewide child support guidelines prescribed by the Conference of Chief District Court Judges.

Because of the specialized nature of the IV-D session of court, motions for modification of custody are not heard, nor do Child Support Enforcement agencies represent parents in regard to any custody issues. While we appreciate this procedural situation and the reason that one motion was heard while the other remained pending, despite its apparent relevance to the issues raised in the motion to modify child support, we have to determine the interlocutory nature of the order based upon the law. The present order failed to resolve the pending custody issue or even to address the parties’ custodial arrangement during the entire

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relevant period, even though the custodial schedule was in dispute.¹ The trial court simply ordered the parties to continue following the prior order, awarding plaintiff \$500 per month despite the fact that the actual custody arrangement had changed.

A change in the custodial arrangement is a substantial change in circumstances affecting child support, as the trial court itself noted, citing *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998). Without knowing the custody arrangement, the trial court cannot determine which child support worksheet to use, or whether to deviate from the guidelines. See N.C. Gen. Stat. § 50-13.4(c1) (2011) (“The guidelines shall include a procedure for setting child support, if any, in a joint or shared custody arrangement which shall reflect the other statutory requirements herein.”); N.C. Child Support Guidelines, AOC-A-162 (2011). So, in effect, this order simply temporarily continues the existing support order until the trial court can hear the custody issues.

This would also explain why the trial court made findings of fact about the parties’ incomes and all information needed to set guideline child support, but failed to make any findings addressing the justification for deviation from the guidelines or any determination of the amount of child support which would be required by the guidelines, and then simply continued in effect the \$500.00 child support amount which the parties had agreed upon in 2010. If the trial court had intended this to be a permanent child support order, the findings and conclusions of law would not support this child support amount, which ignores the findings of fact about the parties’ incomes and other relevant numbers and fails to make any findings as to a need to deviate from the guidelines. But as a temporary order entered by the child support enforcement court to provide for payment of child support until the pending motion to modify custody can be determined and child support set based upon the actual custodial schedule, the order makes sense both legally and practically.

Where our record demonstrates that there was at the time of the hearing a motion to modify custody pending, with the actual custodial schedule uncertain and in dispute, and the child support obligation is presumptively directly dependent upon the custodial schedule, allowing

1. All the trial court could do in this situation, since the pending custody motion was not under consideration, was to make findings regarding the past practice of the parties and whether any retroactive modification of the child support obligation might be justified, and the trial court did make findings concerning this issue. Indeed, defendant did not dispute that the effective date of any retroactive child support modification would be the date of filing of his motion to modify child support.

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the present child support order to be immediately appealed would lead to “fragmentary, premature[,] and unnecessary appeals[.]” *Peters*, ___ N.C. App. at ___, 754 S.E.2d at 439 (first alteration in original). Therefore, we hold that the present order is interlocutory and dismiss the appeal.²

III. Conclusion

For the foregoing reasons, defendant’s appeal from the child support order is dismissed.

DISMISSED.

Judges ERVIN and DAVIS concur.

IN THE MATTER OF THE APPEAL OF GRANDFATHER MOUNTAIN STEWARDSHIP FOUNDATION, INC., FROM THE DECISION OF THE AVERY COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF REAL PROPERTY FOR TAX YEAR 2011

No. COA13-1447

Filed 19 August 2014

1. **Taxation—property—exemption—scientific and educational use**

The North Carolina Property Tax Commission erred by granting the Grandfather Mountain Stewardship Foundation an exemption from property taxes based on scientific and educational activities. The property was not wholly and exclusively used for educational and scientific endeavors.

2. **Taxation—property—exemption—scientific and educational use—use of income from property**

The issue of whether the Property Tax Commission erred by basing its decision on whether to grant a property tax exemption on the use of income from the property was not reached. The property was not used wholly and exclusively for educational and scientific purposes.

2. We note that the Legislature recently enacted Session Law 2013-411, codified at N.C. Gen. Stat. § 50-19.1 (2013), which governs appeals from certain family law orders while other claims remain pending. However, this statute only became effective 23 August 2013, after the order on appeal was entered. 2013 N.C. Sess. Laws ch. 411, § 2. Indeed, defendant has not argued that this statute applies here. Therefore, we do not address how this statute might affect our analysis.

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3. Taxation—property—exemption—charitable association—ownership requirements

The issue of whether the Property Tax Commission erred by holding that the Grandfather Mountain Stewardship Foundation (GMSF) satisfied the statutory ownership requirements for a property tax exemption for a charitable association was not reached because the property was not wholly and exclusively used for educational and scientific endeavors. It was not clear that GMSF would satisfy the ownership requirements even if the issue was addressed.

4. Taxation—property—exemption—vacant lot used as buffer—status—dependent on main parcel

A vacant lot owned by the Grandfather Mountain Stewardship Foundation did not qualify for a property tax exemption where it was found to be a buffer for Grandfather Mountain tourist park. The real property encompassing Grandfather Mountain tourist park was not eligible for the exemption because it was not wholly and exclusively used for educational and scientific endeavors and the status of the buffer lot was dependent on the status of the main parcel. The Property Tax Commission erred by concluding otherwise.

Appeal by Avery County from orders entered 21 February and 24 June 2013 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 22 April 2014.

Poyner Spruill LLP, by Chad W. Essick and Andrew H. Erteschik, and Harrison & Poore, PA, by Michaelle Poore, for appellant Avery County.

Tuggle Duggins, P.A., by Martha R. Sacrinty and Michael S. Fox, for appellee Grandfather Mountain Stewardship Foundation.

BRYANT, Judge.

Where the property was not wholly and exclusively used for educational or scientific purposes pursuant to North Carolina General Statutes, sections 105-275(12) and 105-278.7(a), we reverse the order of the North Carolina Property Tax Commission granting Grandfather Mountain Stewardship Foundation exemption from property taxes.

Grandfather Mountain Stewardship Foundation, Inc. (GMSF), filed an application for exemption from property taxes in Avery County listing three parcels of real property (the subject property). In its 24 December

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2010 application, GMSF indicated that the tax exemption was sought due to GMSF's status as a charitable or educational foundation pursuant to N.C. Gen. Stat. § 105-278.7. The Avery County Tax Assessor's Office denied GMSF's application due to the belief "that Grandfather Mountain is not 'Wholly and exclusively used by its owner for nonprofit educational, scientific, literary purposes' as defined by NCGS § 105-278.7(a) (1)." GMSF appealed to the Avery County 2011 Board of Equalization and Review, stating "[t]he property qualifies as tax exempt under N.C. Gen. Stat. § 105-278.7 and N.C. Gen. Stat. § 105-275(12)" The Equalization and Review Board also denied the request for tax exempt status. GMSF filed a notice of appeal and application for hearing with the North Carolina Property Tax Commission (the Commission).

On 24 June 2013, following a 10 April 2013 hearing, the Commission entered an order in which it concluded that GMSF was a charitable association; that the revenue GMSF collected from the operation of the real property funded the educational and scientific uses of the property; any structures on the real property that were not used directly for scientific or educational purposes were incidental to the scientific and educational uses of the property; and the subject property¹ was "wholly and exclusively used for scientific and educational purposes." The Commission concluded that "[e]ach of the tracts [was] eligible as exempt under both [General Statutes, sections 105-275(12) and 105-278.7]" Avery County appeals to this Court.

On appeal, Avery County raises the following issues: the Commission erred by (I) exempting the property from taxation; (II) holding that the property satisfied the ownership requirements for an exemption; and (III) holding that the vacant lot is exempt from taxation.

I

Avery County argues that the Commission erred by exempting the property from taxation because the property is a self-described tourist attraction that is not "wholly and exclusively used for educational or scientific purposes." Specifically, Avery County contends the Commission

1. GMSF notified the Commission that it abandoned its appeal from the denial of tax exempt status with regard to one of the three parcels of real property listed on its original application for tax exemption. Therefore, only the remaining two land parcels comprised the subject property on review before the Commission. On Parcel Two, GMSF operated the Grandfather Mountain tourist attraction and Parcel Three served "as a buffer tract to preserve the natural area and prevent encroaching development."

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erred in concluding GMSF was eligible for a tax exemption under both N.C. Gen. Stat. §§ 105-275(12) and 105-278.7 because (A) the property was not “wholly and exclusively” used for educational and scientific purposes; (B) the conclusion should have been predicated on how the property was used rather than how the income generated from the property was spent; and (C) the income generated from the property is more than incidental income. For the most part, we agree.

“Statutes exempting property from taxation due to the purposes for which such property is held and used must, of course, be strictly construed against exemption and in favor of taxation.” *In re Forestry Found.*, 35 N.C. App. 414, 428-29, 242 S.E.2d 492, 501 (1978) (citations omitted), *aff’d*, 296 N.C. 330, 250 S.E.2d 236 (1979); *see also In re Appeal of Totsland Preschool, Inc.*, 180 N.C. App. 160, 164, 636 S.E.2d 292, 295 (2006) (“[A]ll ambiguities are to be resolved in favor of taxation.” (citations omitted)). “[T]he taxpayer bears the burden of proving that its property is entitled to an exemption under the law.” *In re Appeal of Eagle’s Nest Found.*, 194 N.C. App. 770, 773, 671 S.E.2d 366, 368 (2009) (citation omitted).

Appeal from an order or decision of the Property Tax Commission shall lie to the Court of Appeals. *See* N.C. Gen. Stat. § 105-345(d) (2013). “Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission’s decision are reviewed under the whole-record test.” *In re Appeal of Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing N.C.G.S. § 105-345.2(b)). This Court “may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings[.]” N.C.G.S. § 105-345.2(b) (2013).

A.

[1] Avery County contends the Commission erred by concluding GMSF’s use of the property was “wholly and exclusively . . . educational and scientific.” We agree.

GMSF acknowledges that it seeks tax exemption on the grounds that it is a charitable association or institution and the subject property is “exclusively held and used by its owners for educational and scientific purposes as a protected natural area” GMSF submitted its application for property tax exemption in December 2010. In its application, GMSF stated that it sought tax exempt status pursuant to General Statutes, section 105-278.7. Following the Avery County Tax Assessor’s denial of GMSF’s application due to the tax assessor’s belief “that Grandfather Mountain is not ‘Wholly and exclusively used

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by its owner for nonprofit educational, scientific, literary purposes' as defined by NCGS § 105-278.7(a)(1)," GMSF filed an application for hearing before the Board of Equalization and Review. In its application for hearing, GMSF maintained that the tax assessor's appraisal should be adjusted because "[t]he property qualifies as tax exempt under N.C. Gen. Stat. § 105-278.7 and N.C. Gen. Stat. § 105-275(12)" However, as noted herein, Avery County appeals the decision of the Property Tax Commission which concluded, *inter alia*, that the subject property was wholly and exclusively used for scientific and educational purposes.

We review this dispositive issue on appeal de novo as there does not appear to be a conflict in the evidence as to the *use* of the property; rather, Avery County challenges whether the legal conclusion is correct as a matter of law. *See In re Appeal of Totsland Preschool, Inc.*, 180 N.C. App. at 162-63, 636 S.E.2d at 295 (This Court reviews questions of law de novo, and "considers the matter anew and freely substitutes its own judgment for that of the Commission.").

Pursuant to General Statutes, section 105-275, as effective at the time GMSF filed its initial application for exemption in 2011, property meeting the following description may be excluded from taxation:

Real property owned by a nonprofit corporation or association exclusively held and used by its owner for educational and scientific purposes as a protected natural area. (For purposes of this subdivision, the term "protected natural area" means a nature reserve or park in which all types of wild nature, flora and fauna, and biotic communities are preserved for observation and study.)

N.C. Gen. Stat. § 105-275(12) (2011)².

2. N.C.G.S. § 105-275(12) was amended by 2011 N.C. Sess. Laws 274 (effective for taxes imposed for taxable years beginning after 1 July 2011). In pertinent part, the amended subdivision reads as follows:

Real property that (i) is owned by a nonprofit corporation or association organized to receive and administer lands for conservation purposes, (ii) is exclusively held and used for one or more of the purposes listed in this subdivision, and (iii) produces no income or produces income that is incidental to and not inconsistent with the purpose or purposes for which the land is held and used. . . . A disqualifying event occurs when the property (i) is no longer exclusively held and used for one or more of the purposes listed in this subdivision, [or] (ii) produces income that is not incidental to and consistent with the purpose or purposes for which the land is held and used The purposes allowed under this subdivision are any of the following:

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Pursuant to North Carolina General Statutes, section 105-278.7,

[b]uildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building shall be exempted from taxation if wholly owned by [a charitable association or institution], and if:

(1) Wholly and exclusively used by its owner for nonprofit educational [or] scientific, . . . purposes as defined in subsection (f)

Id. § 105-278.7(a) (2013).

In *In re Forestry Found.*, 296 N.C. 330, 250 S.E.2d 236, the petitioner sought a tax exemption for 49,455 acres of forest in Onslow County. The petitioner was a nonprofit organization whose objective was “to promote the development and practice of improved forestry methods and to promote the production and preservation of growing timber for experimental, demonstration, educational, park and protection purposes.” *Id.* at 331, 250 S.E.2d at 237-38. In 1934, the Attorney General of North Carolina expressed his opinion that the forest property was exempt from ad valorem taxes “because of the public nature of the ([petitioner]) and the purpose for which these lands [were] held.” *Id.* at 331-32, 250 S.E.2d at 238. In 1945, the petitioner signed a ninety-nine year lease with the Halifax Paper Company, Inc. *Id.* at 332, 250 S.E.2d at 238. Halifax Paper Company’s successor in interest was Hoerner-Waldorf Corporation, which held the lease at the time of the tax exemption hearing. The lease, as amended in 1951, afforded the Hoerner-Waldorf Corporation the right to construct roads, maintain drainage ditches and fire lanes, and cut timber and pulpwood. *Id.* “Students and study groups interested in the operation of the Forest [were] allowed to tour or conduct research in the Forest . . . subject to the contract provision that ‘such study groups or students will do nothing whatsoever to interfere with any program undertaken or in progress by Paper Company in or on [the] Forest.’” *Id.* at 333, 250 S.E.2d at 238-39. In 1975, the petitioner filed an application for tax exemption with the Onslow County Tax Supervisors. The

a. Used for an educational or scientific purpose as a nature reserve or park in which wild nature, flora and fauna, and biotic communities are preserved for observation and study. For purposes of this sub-sub-division, the terms “educational purpose” and “scientific purpose” are defined in G.S. 105-278.7(f).

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application was denied. Arguing before our Supreme Court, the petitioner contended that the forest property was exempt from ad valorem taxes pursuant to four statutes, including N.C.G.S. § 105-275(12), exempting “[r]eal property owned by a nonprofit corporation or association exclusively held and used by its owner for educational and scientific purposes as a protected natural area.” *Id.* at 335, 250 S.E.2d at 240 (emphasis omitted). The Court noted that according to Webster’s Third New International Dictionary, the word “exclusive” was synonymous with the words “sole” and “single” and the Century Dictionary defined the word as “appertaining to the subject alone; not including, admitting, or pertaining to any other or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction.” *Id.* at 337, 250 S.E.2d at 241. The Court held that because the petitioner’s lease agreement, as amended in 1951, gave Hoerner-Waldorf Corporation virtually complete operational control of the forest property and Hoerner-Waldorf Corporation’s use of the forest property was primarily commercial, the property was not exclusively used for scientific and educational purposes. *Id.* at 338-39, 250 S.E.2d 241-42.³

In the instant case, in concluding that the subject property was wholly and exclusively used for scientific and educational purposes, the Commission made several findings of fact detailing the purposes for which the property was used. GMSF engages in a number of educational activities such as teaching visitors about the animals housed on the property, the native flora and fauna, and leading guided hikes, hosting a nature museum, and educating visitors about stewardship. The Commission also found that GMSF provided both formal and informal programs to educate visitors from a range of age groups about the property. It found that GMSF engages in scientific research on the property, such as taking weather measurements and researching air quality, birds, rare plants, well cores, bats, and salamanders. The Commission also found that the property has been designated a United Nations Biosphere Reserve.

Avery County does not dispute that there are educational and scientific activities that occur on the property but contends there are

3. Prior to petitioner’s appeal to our Supreme Court, this Court reasoned that the actual use of property, rather than a goal or objective for its use, determines whether it is to be excluded from the tax base. “Use, rather than ownership or objective, is the primary exempting characteristic of the Machinery Act, G.S. 105-271 through G.S. 105-395, which includes the statute[] under consideration. H. Lewis, *Annotated Machinery Act of 1971*, (Supp.1973, Comment, p. 55).” *In re Forestry Found.*, 35 N.C. App. at 426, 242 S.E.2d at 499-500.

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substantial retail, commercial, recreational, lodging, and office uses that also occur on the property. Several of the Commission's findings support Avery County's contention of substantial retail and commercial activity on the property, including profit from retail sales in excess of one million dollars. Avery County also contends that the vast majority of retail sales on the property are classified by GMSF as "non-mission." We note with interest the Commission's finding that GMSF collects revenue from admission tickets, food sales, souvenir sales, and special programs. The deposition testimony of Emerson Penn Dameron, Jr., President of GMSF, is illuminating as to the activities and uses on the subject property.

President Dameron testified that prior to 1950, Grandfather Mountain was not a travel attraction; individuals visited Grandfather Mountain to hike and explore. Subsequently, the owner of Grandfather Mountain "set about converting it into a more formalized, accessible attraction . . . and began the process of expanding access to the general public rather than just to explorers and naturalists and scientists." "[E]ssentially all of the improvements that are on the property subject to this appeal are located on one parcel." Of the improvements constructed, President Dameron noted a swinging bridge, a small woodcarving shop, two guest cottages, a visitor's center, an animal habitats center, a museum, a fudge shop, and an administrative offices building. In 2010, 244,215 guests visited Grandfather Mountain. Gift shops located in the museum and the visitor's center sold retail items, such as hiking equipment, souvenirs, and snacks. Honey, jelly, fruit, woodcarvings, and books on woodcarving were also sold on the property. Within the nature museum, visitors could purchase food and beverages from an on-site restaurant; nearby, treats could be purchased from a free-standing fudge shop. President Dameron also noted that in 2010, GMSF recognized \$1,108,971.00 in profit from retail sales.

Though not always a source of revenue, the property is also used for annual events such as the Grandfather Mountain Highland Games (which celebrates Scottish heritage as it relates to Western North Carolina), Singing on the Mountain, a Klondike Derby for the boy scouts, a Girl Scout Roundup, a family camping weekend, and corporate picnics. The facility is also made available to local groups such as the Audubon Society, the animal shelter, and Habitat for Humanity.

The land parcels comprising Grandfather Mountain are also subject to a conservation easement with the Nature Conservatory, and have been honored with conservation awards and designated a United Nations Biosphere Reserve. The record supports that the attraction of Grandfather Mountain offers educational and scientific presentations

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about birds, reptiles, animals, and native flora and fauna; and that revenue from the operations on the property is used to further educational and scientific uses on the property.

However, notwithstanding that such educational and scientific endeavors might be the primary uses of GMSF's subject property, we cannot hold that the property is *wholly* and *exclusively* used for educational and scientific endeavors as defined by our Supreme Court in *In re Forestry Found.*, 296 N.C. 330, 250 S.E.2d 236. The observations of the president of the GMSF confirm this.

Q. . . . [O]n June 4, 2009, Grandfather Mountain, Inc., conveyed a conservation easement to the State of North Carolina limiting property owner to using the property for conservation and education activities.

It is true that there are commercial and retail activities that take place on the site. Is that correct?

A. That's correct.

Q. So it not entirely accurate to say that it's limited for conservation and education activities. Is that correct?

A. . . . It does – as we've already noted, it would permit us to continue activities that were already taking place on the mountain above and beyond conservation and education.

There is support in the record that GMSF charges market-rate admission fees and operates to some extent as a for-profit tourist attraction. Located on the property are administrative offices from which GMSF manages Grandfather Mountain's retail and commercial services. Based on the President's comments and the events described in the record, it is clear GMSF operated under the proposition that a change to its Internal Revenue Service 501(c)(3) nonprofit status along with the conveyance of a conservation easement would also exempt the subject property from Avery County property taxes. The record owner of the property commonly known as Grandfather Mountain is Grandfather Mountain, Inc. (GMI), a for-profit corporation. GMSF is a 501(c)(3) nonprofit corporation which is the sole shareholder of GMI and holds the property subject to a triple net lease. The Commission found that this lease places the burdens and obligations of ownership of the subject property on GMSF, including responsibility for paying all real property taxes. Prior to leasing the property to GMSF in 2009, GMI engaged in transactions and granted conservation easements to the Nature Conservatory and the

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State of North Carolina for the purpose of preserving the property for educational and scientific purposes. It appears, based on the observation of GMSF's President, that GMSF was under the impression the conservation easement, by limiting the use of the property for conservation and educational activities, would also allow for the continuance of commercial activities. While that assumption may be valid for purposes of the easement and maintaining the 501(c)(3) status, it is not sufficient to withstand the requirements of N.C.G.S. §§ 105-275(12) and 105-278.7(a). Despite GMSF's status as a 501(c)(3) nonprofit corporation and the conveyance of a conservation easement, the *use* of the property must still come within the scope and meaning of "wholly and exclusively used for educational and scientific purposes." *See In re Forestry Found.*, 296 N.C. at 337-38, 250 S.E.2d at 241 (where the Court considered and rejected petitioner's argument that "the term 'exclusively' is not to be construed literally and that . . . the word refers to the primary and inherent activity and does not preclude incidental activities . . ."). Here, the subject property does not meet the statutory requirements necessary to receive tax exempt status.

Accordingly, we must reverse the Commission's conclusion that the real property subject to GMSF's stewardship is "used wholly and exclusively for scientific and educational purposes."

B and C

[2] Avery County further contends the Commission erred in basing its decision to grant GMSF's request for tax exemption on how the income from the property was spent, instead of how the property was used.

GMSF applied for an exemption from property taxes pursuant to General Statutes, sections 105-275(12) and 105-278.7(a). As discussed in subpart A, both statutes require that the property be used wholly and exclusively for educational and scientific purposes. *See* N.C.G.S. §§ 105-275(12), 105-278.7(a). As we have determined that the subject property is not wholly and exclusively used for educational and scientific purposes, we need not further address this issue.

For the aforementioned reasons, we reverse the Commission's order granting GMSF an exemption from property taxes pursuant to General Statutes, sections 105-275(12) and 105-278.7(a).

II

[3] Next, Avery County argues that the Commission erred by holding GMSF satisfied the ownership requirements imposed by General Statutes, sections 105-275(12) and 105-287.7, to be eligible for property

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tax exemption. We note that because the relevant statutes require ownership to rest in a charitable association or institution *and* be wholly and exclusively used for scientific or educational purposes, and because of our holding in Issue I, we need not reach this argument. However, were we to address it, it is not clear that GMSF would satisfy the statutory ownership requirements. *See In re Appeal of Eagle's Nest Found.*, 194 N.C. App. at 778, 671 S.E.2d at 371 (considering the daily \$150.00 “market rate” charged summer campers and the \$15,000.00 rate charged each student participating in a semester-long high school course load in comparison to the two percent of revenue used for financial aid in concluding the nonprofit 501(c)(3) corporation running the camp did not satisfy the meaning of “charitable association or institution” as considered in N.C. Gen. Stat. § 105-278.7); *see also Rockingham Cnty. v. Elon Coll.*, 219 N.C. 342, 346-47, 13 S.E.2d 618, 621 (1941) (Holding the buildings owned by Elon college and rented for business purposes were taxable despite the college’s use of all the profits for educational purposes. “The fact that a commercial enterprise devotes its entire profits to a charitable or other laudable purpose does not change the character of its business nor the purpose for which it is held. It is still a commercial enterprise, and is held as such.”).

III

[4] Lastly, Avery County argues that the Commission erred by holding that the vacant lot (Parcel Three) is exempt from taxation. Specifically, Avery County contends the Commission failed to find the lot was “necessary for the convenient use of any buildings” as required for exemption pursuant to General Statutes, section 105-278.7. We briefly address the Commission’s ruling as to this separate parcel.

General Statutes, section 105-278.7, allows property tax exemption for “[b]uildings, the land they actually occupy, and *additional adjacent land necessary for the convenient use of any such building . . . if:* (1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes” N.C.G.S. § 105-278.7(a).

In an unchallenged finding of fact, the Commission stated “[t]he Foundation operates the Grandfather Mountain tourist attraction on Parcel Two and uses Parcel Three as a buffer track to preserve the natural area and prevent encroaching development.”

In *In re Appeal of the Master's Mission*, this Court reviewed the Graham County Board of Equalization’s denial of an application to extend the tax exemption granted to 100 acres by more than 1,200 acres as property used for educational purposes. 152 N.C. App. 640, 647, 568

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S.E.2d 208, 213 (2002). The original 100 acres had been granted tax-exempt status “in order to provide a ‘buffer zone’ around the buildings and areas used ‘wholly and exclusively’ for educational purposes.” *Id.* at 648, 568 S.E.2d at 213. Though it affirmed the Board’s denial of an application to extend the buffer, the *Master’s Mission* Court noted “[a] ‘buffer zone’ is additional land around an exempt building or portion of land that is reasonably necessary for the convenient use of any such land or building. We have held that buffering is an appropriate consideration in determining whether an [] exemption applies to a particular parcel.” *Id.* at 648-49, 568 S.E.2d at 213 (citations and quotations omitted).

Here, Parcel Three was found to be “a buffer track to preserve the natural area and prevent encroaching development” upon Parcel Two which accommodates Grandfather Mountain tourist park, and as such, Parcel Three’s status as a tax-exempt property is dependent upon the status of the main tract, Parcel Two. *See generally id.* As we have determined that the real property encompassing Grandfather Mountain tourist park is not eligible for exemption pursuant to N.C.G.S. § 105-278.7, due to its dependent status, Parcel Three must also be ineligible for such exemption. For these reasons, we hold the Commission erred in concluding that the property was eligible for tax exemption pursuant to N.C.G.S. § 105-278.7, as it applies to Parcel Three, the buffer tract.

For the foregoing reasons, we reverse the order of the Commission.

Reversed.

Judges HUNTER, Robert C., and STEELMAN concur.

LIFESTORE BANK v. MINGO TRIBAL PRES. TR.

[235 N.C. App. 573 (2014)]

LIFESTORE BANK, F/K/A AF BANK, PLAINTIFF

v.

MINGO TRIBAL PRESERVATION TRUST DATED JANUARY 4, 1993; PITCHFORK
BASIN, LLC, F/K/A EAC REV NO.6, LLC; TUSCARORA RANCH, LLC AND
ALLEN C. MOSELEY, SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA14-46

Filed 19 August 2014

1. Civil Procedure—two dismissal rule—Rule 41—inapplicable—judicial foreclosure—foreclosure by power of sale

The trial court did not err in an action involving an unpaid promissory note by denying defendants' motion to dismiss and for summary judgment. The "two dismissal rule" of Rule 41 of the Rules of Civil Procedure was not applicable to plaintiff's claim for judicial foreclosure where plaintiff had previously dismissed two claims for foreclosure by power of sale. Plaintiff's claims for foreclosure by power of sale could not, as a form of special proceeding, have been brought in the same action as a claim for money judgment on a promissory note. A different trial court did err in a prior proceeding by dismissing plaintiff's claim for judicial foreclosure as plaintiff could not have brought this claim in the same action as its claims for foreclosure by power of sale.

2. Estoppel—two voluntary dismissals—foreclosure by power of sale—claim for money judgment—no final judgment

The trial court did not err in a case involving an unpaid promissory note by granting plaintiff's motion for summary judgment. Plaintiff's two voluntary dismissals of its actions for foreclosure by power of sale did not act as collateral estoppel upon plaintiff's claims for money judgment because no final judgment had been reached. Further, the nature of these actions — foreclosure by power of sale, judicial foreclosure, and money judgment — are such that these actions, and the issues raised in each, differ.

3. Deeds—deed of trust—promissory note—holder of note

The trial court erred in an action involving an unpaid promissory note by granting summary judgment in favor of plaintiff. There was a material issue of genuine fact as to whether plaintiff was the holder of the note.

Appeal by plaintiff from order entered 28 September 2012 by Judge Stuart Albright and by defendants from order entered 29 August 2013

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by Judge George B. Collins, Jr., both in Wilkes County Superior Court. Heard in the Court of Appeals 7 May 2014.

Di Santi Watson Capua Wilson & Garrett, by Chelsea Bell Garrett, for plaintiff-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Keith J. Merritt, for defendant-appellants.

BRYANT, Judge.

A creditor can seek to enforce payment of a promissory note by pursuing foreclosure by power of sale, judicial foreclosure, or by filing for a money judgment, or all three options, until the debt has been satisfied. The “two dismissal rule” of Rule 41 does not bar a creditor from bringing an action for *judicial foreclosure* or for money judgment where the creditor has filed and then taken voluntary dismissals from two prior actions for foreclosure by power of sale. Collateral estoppel is not applicable where a final judgment in an action has not been reached. Where there exists genuine issues of material fact as to whether a creditor is the holder of an enforceable instrument, summary judgment is not appropriate.

A. The Tuscarora Note

On 12 February 2007, defendant Mingo Tribal Preservation Trust (“Mingo”) entered into a promissory note with plaintiff Lifestore Bank (“Lifestore”) for \$2,450,000.00 (the “Tuscarora Note”). The Tuscarora Note was secured by a deed of trust on property in Wilkes County owned by defendant Tuscarora Ranch, LLC (“Tuscarora”).

On 1 December 2010, Lifestore initiated a foreclosure by power of sale proceeding against Mingo and Tuscarora, alleging that Mingo was in default on the Tuscarora Note. The Wilkes County Clerk of Court entered an order finding that Mingo was in default and Lifestore could conduct a foreclosure by power of sale of the Tuscarora property. Mingo appealed to the Superior Court, and on 8 March 2011, the Wilkes County Superior Court affirmed the Clerk’s order allowing Lifestore to foreclose on the Tuscarora property. On 6 April 2011, Mingo appealed the Superior Court’s order to this Court and filed a motion to stay enforcement of the Superior Court’s order. Mingo’s motion to stay was granted on 15 April. After filing its appeal with this Court on 26 August, Mingo and Lifestore agreed to file a joint motion to dismiss the appeal which was granted by

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this Court. On 10 October 2011, Lifestore entered a voluntary dismissal without prejudice as to the foreclosure by power of sale action.

On 7 December 2011, Lifestore filed a second foreclosure by power of sale action against Mingo and Tuscarora alleging that Mingo had defaulted on the Tuscarora Note. On 8 March 2012, the Clerk of Court entered an order allowing the foreclosure. Mingo appealed the order to the Wilkes County Superior Court. Lifestore entered a voluntary dismissal as to the foreclosure by power of sale on 13 July 2012.

B. The EAC Note

On 8 February 2008, Mingo entered into a new promissory note for \$1,800,000.00 with Lifestore. To secure this loan, Lifestore took a security interest in a promissory note held between Mingo and Pitchfork Basin, f/k/a EAC (“EAC”). The promissory note between Mingo and EAC (the “EAC Note”) was entered into on 21 November 2006 and was secured by a deed of trust between EAC and Mingo.

On 1 December 2010, Lifestore filed a foreclosure by power of sale action against Mingo and EAC alleging that Mingo had defaulted on the EAC Note and Lifestore could, therefore, foreclose on the EAC deed of trust. The Wilkes County Clerk of Court entered an order that same day finding that Lifestore could foreclose; this order was appealed to the Wilkes County Superior Court. On 8 March 2011, the Superior Court affirmed the Clerk of Court’s order allowing the foreclosure. Mingo and EAC appealed to this Court on 6 April 2011; on 7 October 2011, Lifestore took a voluntary dismissal without prejudice.

On 7 December 2011, Lifestore filed a second foreclosure by power of sale action against Mingo and EAC alleging that Mingo had defaulted on the EAC Note. The Clerk of Wilkes County Superior Court entered an order on 8 March 2012 allowing the foreclosure; Mingo and EAC appealed this order to the Superior Court. Lifestore entered an oral notice of voluntary dismissal as to the foreclosure by power of sale on 7 May during the foreclosure hearing; a written notice of voluntary dismissal was entered 13 July 2012.

C. The Current Complaint

On 6 June 2012, Lifestore filed a complaint against Mingo, Tuscarora, and EAC which asserted three claims for: judgment against Mingo and EAC as to the EAC Note; judgment against Mingo as to the Tuscarora Note; and judicial foreclosure of the Tuscarora and EAC deeds of trust. Mingo, Tuscarora, and EAC (“defendants”) filed a motion to dismiss Lifestore’s complaint pursuant to Rule 41 of the Rules of Civil Procedure

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on 17 August 2012. On 28 September 2012, the trial court entered an order denying defendants' motion to dismiss Lifestore's first and second claims for relief, and granting defendants' motion to dismiss as to Lifestore's third claim for judicial foreclosure.

On 8 April 2013, Lifestore filed a motion for judgment on the pleadings pursuant to Rule 12(c) or, in the alternative, for summary judgment pursuant to Rule 56 as to its first and second claims for relief in its complaint. Defendants filed a motion for summary judgment on 23 April. On 29 August 2013, the trial court entered an order allowing Lifestore's motion for summary judgment and denying defendants' motion for summary judgment. Both Lifestore and defendants appeal.

Defendants raise two issues as to whether the trial court erred in (I) denying defendants' motion to dismiss and for summary judgment and (II) in granting judgment in favor of Lifestore on the EAC Note. Plaintiff Lifestore raises the sole issue of whether the trial court erred in (III) dismissing Lifestore's claim for judicial foreclosure.

I. & III.

[1] As defendants' first issue on appeal concerns the same matter as that of Lifestore's sole issue on appeal, i.e., whether the trial court erred in its application of the "two dismissal rule" of Rule 41, we address both issues together.

Defendants first argue that the trial court erred in denying their motion to dismiss and for summary judgment. In contrast, Lifestore contends the trial court erred in dismissing its claim for judicial foreclosure. We disagree as to defendants, and agree as to Lifestore.

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). When a motion for summary judgment is brought, the trial court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). The movant "has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citation omitted).

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When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. In addition, [i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.

Rankin v. Food Lion, 210 N.C. App. 213, 215, 706 S.E.2d 310, 312-13 (2011) (citations and quotations omitted).

Defendants contend the trial court erred in denying their motion to dismiss and for summary judgment as to Lifestore's first and second claims for relief. Specifically, defendants argue that pursuant to the "two dismissal rule" of Rule 41, Lifestore's claims for judgment on the Tuscarora and EAC promissory notes were barred. Lifestore, in contrast, argues that its claim for judicial foreclosure is not barred pursuant to the "two dismissal rule" of Rule 41.

Foreclosure and Rule 41

A foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply. *See Phil Mech. Constr. Co. v. Haywood*, 72 N.C. App. 318, 320-21, 325 S.E.2d 1, 2-3 (1985). North Carolina Rules of Civil Procedure, Rule 41, states that:

an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim.*

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2013) (emphasis added).

[I]n enacting the two dismissal provision of Rule 41(a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would

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operate as an adjudication on the merits and bar a third action based upon the same set of facts.

Richardson v. McCracken Enters., 126 N.C. App. 506, 509, 485 S.E.2d 844, 846 (1997). “The ‘two dismissal’ rule has two elements: (1) the plaintiff must have filed two notices to dismiss under Rule 41(a)(1) and (2) the second action must have been based on or included the same claim as the first action.” *Dunton v. Ayscue*, 203 N.C. App. 356, 358, 690 S.E.2d 752, 753 (2010) (citing *City of Raleigh v. Coll. Campus Apartments, Inc.*, 94 N.C. App. 280, 282, 380 S.E.2d 163, 165 (1989)).

Defendant contends the “two dismissal rule” of Rule 41 bars Lifestore from bringing claims for money judgment on the two promissory notes because the claims for money judgment are based on the same set of facts as Lifestore’s motions for foreclosure by power of sale and, therefore, because Lifestore took two voluntary dismissals as to the actions for foreclosure by power of sale, it is now barred under Rule 41 from pursuing its claims for money judgments.

This Court has held that “a creditor-mortgagee such as [Lifestore] has an election of remedies. Upon default, it may sue to collect on the unpaid note or foreclose on the land used to secure the debt, or both, until it collects the amount of debt outstanding.” *G.E. Capital Mort. Servs., Inc. v. Neely*, 135 N.C. App. 187, 192, 519 S.E.2d 553, 557 (1999) (citation omitted). If a creditor seeks to foreclose on property, they may proceed under N.C. Gen. Stat. § 45-21.1 *et seq.* (foreclosure by power of sale), or under N.C. Gen. Stat. § 1-339.1 *et seq.* (judicial foreclosure). *See In re Young*, ___ N.C. App. ___, ___, 744 S.E.2d 476, 480 (2013).

At a foreclosure [by power of sale] hearing pursuant to N.C. Gen.[.]Stat. § 45-21.16, the clerk of superior court is limited to making the six findings of fact specified under subsection (d) of that statute: (1) the existence of a valid debt of which the party seeking to foreclose is the holder; (2) the existence of default; (3) the trustee’s right to foreclose under the instrument; (4) the sufficiency of notice of hearing to the record owners of the property; (5) the sufficiency of pre-foreclosure notice . . . ; and (6) the sale is not barred by section 45-21.12A [pursuant to] N.C. Gen. Stat. § 45-21.16(d)[.] The clerk’s findings are appealable to the superior court for a hearing de novo; however, in a section 45-21.16 foreclosure proceeding, the superior court’s authority is similarly limited to determining whether the six criteria of N.C. Gen.[.]Stat. § 45-21.16(d) have been satisfied.

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Id. at ___, 744 S.E.2d at 479 (citations omitted).

Lifestore first sought to foreclose on defendants' property by filing, then taking voluntary dismissals from, two actions for foreclosure by power of sale stemming from defendants' default upon the two promissory notes. In Lifestore's instant (and third) complaint, Lifestore now seeks to obtain money judgments against defendants as to the two promissory notes. While a foreclosure by power of sale is a type of special proceeding, limited in scope and jurisdiction, in which the clerk of court determines whether a foreclosure pursuant to a power of sale should be granted, a claim for money judgment arising from a default upon a promissory note must be brought through the filing of a complaint in a civil action. *See id.* at ___, 744 S.E.2d at 479 (noting that in an action for foreclosure by power of sale, "[t]he clerk's findings are appealable to the superior court for a hearing de novo; however, in a section 45-21.16 foreclosure [by power of sale] proceeding, the superior court's authority is similarly limited to determining whether the six criteria of N.C. Gen.[.]Stat. § 45-21.16(d) have been satisfied. The superior court has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in [N.C. Gen.[.]Stat. §] 45-21.16." (citations and quotation omitted)); *United Carolina Bank v. Tucker*, 99 N.C. App. 95, 98, 392 S.E.2d 410, 411 (1990) ("A foreclosure by power of sale is a special proceeding commenced without formal summons and complaint and with no right to a jury trial." (citation omitted)). As such, an action for foreclosure by power of sale differs from a claim for money judgment, as while both actions may concern the same parties, property, and promissory note(s), each action must be brought separately due to a foreclosure by power of sale being of limited jurisdiction and scope.

In its order granting Lifestore's motion for summary judgment, the trial court noted the following:

Defendants contend that the "two dismissal rule" of Rule 41 of the North Carolina Rules of Civil Procedure gives them an absolute defense, not only to Claim Three of the complaint (upon which Defendants have previously prevailed on their Motion for Summary Judgment and which is therefore not before this Court)¹ but also to Claims One and Two of the Complaint.

1. The trial court is referring to Judge Albright's 28 September 2012 order granting defendants' motion to dismiss Lifestore's third claim for relief for judicial foreclosure, from which Lifestore now appeals (*Issue III*).

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Claims One and Two of the complaint seek a money judgment against the Defendants for failure to pay debts. Claim Three seeks to have the Court order a judicial foreclosure of certain real property that allegedly served as security for said debts. [Lifestore] had previously filed two successive foreclosure actions pursuant to Chapter 45 of the North Carolina General Statutes under the Trustee's power of sale provision. [Lifestore] had voluntarily dismissed both actions under Rule 41.

[Lifestore] argues that the "two dismissal rule" does not apply to foreclosures pursuant to Chapter 45, citing a case from the North Carolina Court of Appeals that predated the enactment of broad amendments to Chapter 45. Defendant argues that the plain language of the Rules of Civil Procedure make them apply to Chapter 45 unless provided otherwise by law. This Court need not address this issue because it finds that the "two dismissal rule" would not apply in this case, even if it does apply to Chapter 45 foreclosures.

In enacting the two dismissal provision of Rule 41(a) (1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts. Richardson v. McCracken Enters., 126 N.C. App. 506, 509; 485 S.E.[]2d 844, 846 (1997)[,] *aff'd*, 347 N.C. 660, 496 S.E.[]2d 380 (1998). The test is whether the actions are claims based upon the same core of operative facts and whether all of the claims could have been asserted in the same cause of action. *Id.*

Here, while Claims One and Two of the Complaint are based on the same core of operative facts as the foreclosure actions, they are not claims that could have been asserted in the foreclosure actions and therefore are not barred by Rule 41. A foreclosure action only allows the sale of property. While it is true that the Clerk must find a valid debt, the action itself does not allow for the entry of a judgment on that debt.

Defendants contend the trial court erred in its analysis of *Richardson* as Rule 41 only requires a determination of "whether the actions are claims

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based upon the same core of operative facts.” Defendants’ argument lacks merit, as the trial court was accurate in its analysis of *Richardson*.

In *Richardson*, the plaintiffs filed an action against the defendant oil company alleging trespass, strict liability, negligence, and punitive damages caused by the defendant allowing diesel fuel and oil to leak onto the plaintiffs’ property. *Richardson*, 126 N.C. App. at 507, 485 S.E.2d at 845. The plaintiffs voluntarily dismissed their claims without prejudice and then filed a new action against the defendant for nuisance based on the same facts as alleged in the first action. *Id.* The plaintiffs then voluntarily dismissed their second action without prejudice and filed a third action containing all of the claims asserted in their first and second actions. *Id.* The defendant moved for summary judgment, arguing that the plaintiffs’ third action was barred under the “two dismissal rule” of Rule 41. *Id.* The trial court granted the defendant’s motion and this Court affirmed, noting that where the two previously dismissed actions “asserted claims based upon the same core of operative facts relating to the contamination of plaintiffs’ property, and all of the claims could have been asserted in the same cause of action[.]” Rule 41(a)(1) barred the plaintiffs’ third action. *Id.* at 509, 485 S.E.2d at 846-47.

Richardson is distinguishable from the instant matter, as Lifestore’s claims for foreclosure by power of sale could not, as a form of special proceeding, be brought in the same action as a claim for money judgment on a promissory note. As such, we disagree with defendants’ contention the trial court erred in holding that Rule 41’s “two dismissal rule” is not applicable to Lifestore’s claims for money judgment.

Defendants further argue that Lifestore’s claims for money judgment are barred under the “two dismissal rule” of Rule 41 because Lifestore’s voluntary dismissals of its actions for foreclosure by power of sale are, under Rule 41, an adjudication on the merits. We disagree.

Lifestore pursued two foreclosures by power of sale under N.C.G.S. § 45-21.16(a) each against Mingo and EAC, 10 SP 423 and 11 SP 395, and against Mingo and Tuscarora, 10 SP 424 and 11 SP 394. Lifestore subsequently took voluntary dismissals of each foreclosure by power of sale action. As such, the “two dismissal rule” of Rule 41 applies here for, by taking two sets of voluntary dismissals as to its claims for foreclosure by power of sale, the second set of voluntary dismissals is an adjudication on the merits which bars Lifestore from undertaking a third foreclosure by power of sale action pursuant to N.C.G.S. § 45-21.16(a).

However, in the instant matter Lifestore has now filed a complaint seeking, in addition to money judgments, judicial foreclosure against

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defendants. As already noted, a creditor may pursue foreclosure, money judgment, or both in order to collect on a debt. *See G.E. Capital Mort. Servs.*, 135 N.C. App. at 192, 519 S.E.2d at 557. This Court has more recently held that a creditor seeking to foreclose on property can do so under both N.C.G.S. § 45-21 *et seq.*, foreclosure by power of sale, and N.C.G.S. § 1-336 *et seq.*, judicial foreclosure. *In re Young*, ___ N.C. App. at ___, 744 S.E.2d at 480.

In *In re Young*, the respondents defaulted on their loan with the petitioner. *Id.* at ___, 744 S.E.2d at 477-48. The respondents then agreed to a loan modification agreement with the petitioner and began making payments in accordance with the agreement. *Id.* at ___, 744 S.E.2d at 478. The petitioner alleged that the loan modification was never finalized and demanded that the respondents return to making payments under the terms of the original loan, but the respondents refused. *Id.* The petitioner subsequently filed for a foreclosure by power of sale, and during the special proceeding hearing the clerk of court dismissed the petitioner's action on grounds that the petitioner never finalized the loan modification agreement with the respondents. *Id.* On appeal to Superior Court, the petitioner's action for foreclosure was again dismissed on grounds that because the petitioner had begun to undertake a loan modification agreement with the respondents, the petitioner's action for foreclosure was now barred by equitable estoppel. *Id.* This Court vacated and remanded the petitioner's appeal for a determination of subject matter jurisdiction, but noted that if the petitioner was now barred from pursuing a foreclosure by power of sale, the petitioner could still pursue a judicial foreclosure. *Id.* at ___, 744 S.E.2d at 478-80.

Lifestore argues that the trial court erred in dismissing its claim for judicial foreclosure. We agree, and find *In re Young* to be instructive. This Court noted in *Young* that a judicial foreclosure differs from a foreclosure by power of sale in that a judicial foreclosure is not a type of special proceeding and, as such, can be pursued by a creditor after a foreclosure by power of sale has failed. *See id.* at ___, 744 S.E.2d at 480 (holding that if the petitioner's action for foreclosure by power of sale was now barred, "[p]etitioner's remedy would then be limited to judicial foreclosure procedures pursuant to N.C. Gen. Stat. § 1-339.1 *et seq.*, rather than the summary proceedings provided under N.C. Gen. Stat. § 45-21.1 *et seq.*"); *see also Phil Mech. Constr. Co.*, 72 N.C. App. at 321, 325 S.E.2d at 3 ("Foreclosure by action requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails." (citation omitted)). As a judicial foreclosure

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is not a type of special proceeding limited in scope and jurisdiction, the “two dismissal rule” of Rule 41 is not applicable to Lifestore’s claim for judicial foreclosure as Lifestore could not have brought a claim for judicial foreclosure in the same action as its claims for foreclosure by power of sale. *See Richardson*, 126 N.C. App. at 508-09, 485 S.E.2d at 846-47 (holding that the “two dismissal rule” of Rule 41 does not apply where all of a party’s claims could not be asserted in the same action). Accordingly, the trial court erred in finding that Lifestore’s claim for judicial foreclosure was barred under the “two dismissal rule” of Rule 41. We therefore reverse as to Lifestore’s argument.

Collateral Estoppel

[2] Defendants further contend the trial court erred in granting Lifestore’s motion for summary judgment because Lifestore’s two voluntary dismissals of its actions for foreclosure by power of sale now act as collateral estoppel upon Lifestore’s claims for money judgment. We disagree.

For collateral estoppel to bar plaintiff’s action, defendants must show: (1) the earlier action resulted in a final judgment on the merits, (2) the issue in question is identical to an issue actually litigated in the earlier suit, (3) the judgment on the earlier issue was necessary to that case and (4) both parties are either identical to or in privity with a party or the parties from the prior suit.

Bee Tree Missionary Baptist Church v. McNeil, 153 N.C. App. 797, 799, 570 S.E.2d 781, 783 (2002) (citations omitted).

Defendants cite three cases in support of their contention that collateral estoppel applies to Lifestore’s claims for money judgment: *Petri v. Bank of Am.*, No. COA13-907, 2014 N.C. App. LEXIS 157 (Feb. 4, 2014); *Haughton v. HSBC Banks USA*, No. COA12-420, 2013 N.C. App. LEXIS 92 (Feb. 5, 2013); and *Peak Coastal Ventures, LLC v. Suntrust Bank*, No. 10 CVS 6676, 2011 NCBC LEXIS 13 (N.C. Sup. Ct., Forsyth Cnty., May 5, 2011).²

2. Pursuant to Rule 30(e) of our Rules of Appellate Procedure, “[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored[.]” N.C. R. App. Proc. 30(e) (3) (2014). As such, these cases cited by defendants are not controlling authority upon this Court. Moreover, we decline to consider defendants’ arguments as to *Peak Coastal Ventures* as this opinion is not from our appellate courts.

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Petri and *Haughton* are not applicable to the instant case. In *Petri* and *Haughton*, final judgments were reached in foreclosure proceedings against the plaintiffs; none of the plaintiffs appealed. *Petri* at *1-3; *Haughton* at *1-3. When the plaintiffs later filed complaints relating back to the foreclosure proceedings, the trial court held, and this Court affirmed, that the plaintiffs' complaints were barred by collateral estoppel because the issues raised in the complaints had already been decided in final judgments reached in the foreclosure proceedings. *Petri* at *5-10; *Haughton* at *3-11.

Here, Lifestore took two sets of voluntary dismissals from its foreclosure by power of sale actions against defendants. The first voluntary dismissal was taken after defendants had appealed to this Court, and the second was taken during the Superior Court's hearing on defendants' appeal of the Clerk of Court's order granting Lifestore foreclosure by power of sale. In each instance, no final judgment was reached. As such, although Lifestore is barred from bringing a third action for foreclosure by power of sale due to the application of Rule 41, collateral estoppel is not applicable because a final judgment was not reached. *See First Union Nat'l Bank v. Richards*, 90 N.C. App. 650, 653, 369 S.E.2d 620, 621 (1988) (holding that a final judgment has not been reached in a case where a plaintiff has not abandoned, dismissed, or withdrawn its appeal, "but rather took a voluntary dismissal of the action."). Further, as already discussed the nature of these actions — foreclosure by power of sale, judicial foreclosure, and money judgment — are such that these actions, and the issues raised in each, differ. Accordingly, although Lifestore's two claims for foreclosure by power of sale are now barred under Rule 41, Rule 41 does not bar Lifestore from bringing its current claims for money judgment and judicial foreclosure against defendants, nor are Lifestore's current claims barred by collateral estoppel. Therefore, we overrule defendants' argument (*Issue I*) and reverse as to Lifestore's argument (*Issue III*).

II.

[3] Defendants next contend the trial court erred in granting judgment in favor of Lifestore on the EAC Note. We agree.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A trial court's grant of summary judgment receives *de novo* review on

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appeal, and evidence is viewed in the light most favorable to the non-moving party.

TD Bank, N.A. v. Mirabella, ___ N.C. App. ___, ___, 725 S.E.2d 29, 30 (2012) (citation omitted).

Defendants argue that the trial court erred in finding Lifestore was entitled to a judgment against EAC on the EAC Note because Lifestore failed to prove that it is the holder of the note. In its order, the trial court noted the following:

Defendants also argue that [Lifestore] cannot obtain a judgment against EAC/Pitchfork Basin, LLC because it cannot prove and has not alleged that it is the holder of the Note made to [Mingo] by EAC/Pitchfork LLC and assigned to [Lifestore]. This argument fails because the record in the case shows that [Lifestore] has met the requirements of North Carolina General Statutes Section 25-9-203(b)(3)(a).

Pursuant to North Carolina General Statutes, Article 9 — Secured Transactions, “[a] security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral[.]” N.C. Gen. Stat. § 25-9-203(a) (2013).

[A] security interest is enforceable against the debtor and third parties with respect to the collateral only if:

- (1) Value has been given;
- (2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
- (3) . . . The debtor has authenticated a security agreement that provides a description of the collateral[.]

Id. § 25-9-203(b)(1), (2), (3)(a) (2013).

As part of the EAC Note between Mingo and Lifestore, Mingo executed an assignment of note which granted Lifestore a security interest in the deed of trust between EAC and Mingo. We agree with the trial court that Lifestore has met the requirements of N.C.G.S. § 25-9-203(b)(3)(a), as the record indicates that Lifestore gave value to Mingo (via a promissory note for \$1,800,000.00) in exchange for a security interest in collateral (the deed of trust between Mingo and EAC), as provided in an authenticated security agreement (the assignment of note between Lifestore and Mingo).

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Lifestore, as the holder of an enforceable instrument (the assignment of note) may seek to enforce payment of that instrument. *See TD Bank*, ___ N.C. App. at ___, 725 S.E.2d at 31. However, Lifestore must prove that it is the holder of the instrument, and “[t]he requirement that [Lifestore] prove [its] status as a holder of the note is distinguishable from a requirement that [Lifestore] allege that status in [its] pleadings.” *Liles v. Myers*, 38 N.C. App. 525, 527, 248 S.E.2d 385, 387 (1978). “Mere possession of a note payable to order does not suffice to prove ownership or holder status.” *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980) (citations omitted).

Here, Lifestore attached photocopies of the assignment of note executed between itself (as AF Bank) and Mingo and the EAC Note to its complaint. Lifestore did not provide the actual documents during the trial court’s hearing on the parties’ motions for summary judgment however, and defendants filed an affidavit containing an email from Lifestore in which Lifestore admitted it was not in possession of the original EAC Note. Further, Lifestore did not provide evidence establishing it as the holder of the EAC Note during the trial court’s hearing. Lifestore contends that although the EAC Note may be lost, it remains the holder of the note and is, thus, entitled to enforce it.

We find that *Liles v. Myers* is applicable to the instant case. In *Liles*, the plaintiff brought an action for money judgment against the defendant alleging the defendant had defaulted upon a promissory note. *Liles*, 38 N.C. App. at 525, 248 S.E.2d at 386. The plaintiff then filed a motion for summary judgment which the trial court granted. This Court reversed, noting that:

Prior to being entitled to a judgment against the defendant, the plaintiff was required to establish that she was [the] holder of the note at the time of this suit. This element might have been established by a showing that the plaintiff was in possession of the instrument and that it was issued or endorsed to her, to her order, to bearer or in blank. It is essential that this element be established in order to protect the maker from any possibility of multiple judgments against him on the same note through no fault of his own.

...

As evidence that a plaintiff is holder of a note is an essential element of a cause of action upon such note, the

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defendant was entitled to demand strict proof of this element. By his answer denying the allegations of the complaint, the defendant demanded such strict proof. The incorporation by reference into the complaint of a copy of the note was not in itself sufficient evidence to establish for purposes of summary judgment that the plaintiff was the holder of the note. As the record on appeal fails to reveal that the note itself or any other competent evidence was introduced to show that the plaintiff was the holder of the note, she has failed to prove each essential element of her claim sufficiently to establish her entitlement to summary judgment.

Id. at 526-28, 248 S.E.2d at 387-88 (citations omitted).

Here, defendants demanded strict proof that Lifestore is the holder of the EAC Note. Lifestore attached a copy of the assignment of note and the EAC Note to its complaint, but admitted at the trial court's hearing that it could not find the original documents. *See id.* Accordingly, as there remain genuine issues of material fact as to whether Lifestore is the holder of the EAC Note and can, therefore, enforce it, we must reverse and remand as to this issue.

Affirmed in part; reversed in part; and remanded.

Judges CALABRIA and GEER concur.

N. STAR MGMT. OF AM., LLC v. SEDLACEK

[235 N.C. App. 588 (2014)]

NORTHERN STAR MANAGEMENT OF AMERICA, LLC, PLAINTIFF

v.

MARK SEDLACEK, DEFENDANT

No. COA13-1427

Filed 19 August 2014

1. Appeal and Error—interlocutory orders and appeals—preliminary injunction—substantial right

Defendant's appeal from the trial court's interlocutory order enjoining him from violating non-compete provisions contained in an agreement he had entered into with his former employer was heard on the merits. North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions in cases involving an alleged breach of a non-competition agreement.

2. Contracts—non-compete agreement—terms of the agreement—applicable law

The trial court correctly concluded that New Jersey law governed its determination concerning the enforceability of the parties' non-compete covenants. The language of the terms of the parties' agreement manifested this intent.

3. Appeal and Error—issue not before the court—argument dismissed

Defendant's argument that the trial court erred in concluding that the covenants included in the 2010 Asset Purchase Agreement applied because they were superseded by the covenants set forth in the 2010 Consulting Agreement was dismissed. The issue was not properly before the Court of Appeals because the trial court only enjoined defendant from continued violations of the covenants contained in the Consulting Agreement.

4. Injunctions—non-compete agreement—overly broad—reasonableness of geographic scope—reasonableness of scope of restricted activities

An order enjoining defendant from participating in certain activities based on the terms of a non-competition agreement was vacated and remanded where certain covenants were overly broad. The order was remanded for entry of findings with respect to the reasonableness of the geographic scope of the covenants and to

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tailor the geographic scope of the restrictions to that area that was reasonable under the circumstances as supported by the court's findings. The order was also remanded for entry of findings and conclusions with respect to the reasonableness of the scope of the restricted activities.

Appeal by Defendant from order entered 4 September 2013 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 24 April 2014.

Nelson Levine de Luca & Hamilton, by David G. Harris II, David L. Brown, and John I. Malone, Jr., for Plaintiff.

Carruthers & Roth, P.A., by Mark K. York and J. Patrick Haywood, for Defendant.

DILLON, Judge.

Mark Sedlacek appeals from the trial court's order enjoining him from violating non-compete provisions contained in an agreement he entered into with his former employer, Northern Star Management of America, LLC ("Northern Star"). For the following reasons, we vacate and remand for further proceedings consistent with this opinion.

I. Factual & Procedural Background

Northern Star is a company which specializes in the design, development and administration of insurance products. Its principal place of business is located in North Carolina, though its parent company, Northern Star Management, Inc., is based in New Jersey. Mr. Sedlacek, a North Carolina resident, has worked in the insurance industry since 1982 and specializes in "creating and managing insurance products for and on behalf of commercial carriers related to collateral recovery (repossession), automobile transporters, and towing."

In early 2010, Mr. Sedlacek was an officer and part-owner of AEON Insurance Group, Inc., when AEON was purchased by Northern Star. Mr. Sedlacek thereafter worked for Northern Star, on and off, until June 2013. During this time, Mr. Sedlacek and Northern Star entered into three agreements, each of which contained non-compete and confidentiality provisions (hereinafter referred to generally as the "covenants"), whereby Mr. Sedlacek agreed to refrain from engaging in certain activities in the insurance business within certain territories for a specified period of time.

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The parties entered into the first two agreements (collectively, the “2010 Agreements”) around the time of Northern Star’s purchase of AEON, and each included a provision designating New Jersey law as governing the agreements. Mr. Sedlacek signed the first agreement (the “Asset Purchase Agreement”) as an owner of AEON, agreeing to sell AEON’s assets and liabilities to Northern Star and to refrain from using Northern Star’s confidential information and from engaging in certain activities in the insurance business with Northern Star “worldwide.” In the second agreement (the “Consulting Agreement”), Mr. Sedlacek agreed to work as a consultant for Northern Star and further agreed not to engage in certain activities in the insurance business and not to use Northern Star’s confidential information outside his relationship with Northern Star for a certain period in the United States and its territories.

The parties entered into the third agreement (the “Severance Agreement”) in February 2013, when Mr. Sedlacek temporarily separated from Northern Star. Pursuant to this agreement, Mr. Sedlacek accepted a severance payment and acknowledged that his obligations under the prior agreements would continue in accordance with their terms. The Severance Agreement contained a provision designating North Carolina law as governing that agreement. Mr. Sedlacek was rehired by Northern Star the day after the parties executed the Severance Agreement and continued his employment with Northern Star for approximately four additional months before resigning on 23 June 2013.

Northern Star commenced the present action in August 2013, within two months of Mr. Sedlacek’s resignation, alleging that Mr. Sedlacek had engaged in competitive activities in violation of the covenants contained in the 2010 Agreements. Northern Star requested an injunction proscribing Mr. Sedlacek from further violation of the covenants.

At the preliminary injunction hearing, Northern Star introduced evidence that Mr. Sedlacek had violated the covenants. Mr. Sedlacek asserted that the covenants imposed overly broad restrictions, rendering them unenforceable under North Carolina law. Northern Star countered that New Jersey law governed and that, accordingly, even if the covenants were overly broad as written, the court possessed the authority to modify the covenants to bring them into compliance with New Jersey law.

By order entered 4 September 2013, the trial court concluded that New Jersey law applied with respect to its interpretation of the covenants; granted Northern Star’s request for a preliminary injunction;

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and directed that Mr. Sedlacek refrain from further violation of the covenants contained in the 2010 Consulting Agreement. The trial court also indicated in its order that Northern Star had presented sufficient evidence to establish that it would likely prevail on the merits of its claims against Mr. Sedlacek and, moreover, that Northern Star would likely sustain irreparable loss absent the injunction. From this order, Mr. Sedlacek appeals.

II. Jurisdiction

[1] The trial court's preliminary injunction order is interlocutory in nature, in that it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). This Court has jurisdiction over an interlocutory appeal where the order "affects some substantial right claimed by [the] appellant and will work injury to him if not corrected before an appeal from the final judgment." *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (citation omitted). We have stated that "[i]n cases involving an alleged breach of a non-competition agreement[,] North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions" *QSP, Inc. v. Hair*, 152 N.C. App. 174, 175, 566 S.E.2d 851, 852 (2002); *see also Copypro, Inc. v. Musgrove*, __ N.C. App. __, __, 754 S.E.2d 188, 191 (2014) ("[W]hen the entry of an order granting a request for the issuance of a preliminary injunction has the effect of destroying a party's livelihood, the order in question affects a substantial right and is, for that reason, subject to immediate appellate review."). We accordingly proceed to address the merits of Mr. Sedlacek's appeal.

III. Standard of Review

In order to obtain a preliminary injunction, the movant must demonstrate (1) that it will likely succeed on the merits of its case; and (2) that it will likely sustain irreparable harm absent the injunction. *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Mr. Sedlacek does not challenge any of the trial court's factual findings; rather, he takes issue with the trial court's legal conclusions, which this Court reviews *de novo* on appeal. *Copypro, Inc.*, __ N.C. App. at __, 754 S.E.2d at 191 (stating that where "the ultimate question for our consideration is whether the trial court correctly applied the applicable law to the undisputed record evidence, [we] utilize a *de novo* standard of review").

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IV. Analysis

Mr. Sedlacek raises three primary contentions on appeal: (1) the trial court erred in applying New Jersey law instead of North Carolina law; (2) the trial court erred in concluding that the covenants contained in the Asset Purchase Agreement apply; and (3) the trial court erred in concluding that the terms of the covenants were valid and enforceable as written. Upon careful review of the record and the parties' arguments, we conclude that the trial court did not err in applying New Jersey law and in determining that the Asset Purchase Agreement was applicable. We further conclude, however, that in applying New Jersey law the trial court should have determined whether the scope of the covenants was overly broad and, if so, should have appropriately narrowed the restrictions and tailored the preliminary injunction accordingly. Thus, for the reasons set forth below, we vacate the trial court's order and remand to the trial court for entry of findings and conclusions concerning the scope of the preliminary injunction consistent with this opinion.

A. Choice of Law

[2] Mr. Sedlacek argues that the trial court incorrectly applied New Jersey law, in that the choice-of-law provision in the Severance Agreement — which designates North Carolina law as governing that agreement — effectively supersedes the choice-of-law provisions in the Asset Purchase Agreement and the Consulting Agreement, both of which designate New Jersey law as governing.

“Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution.” *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). The intent of the parties “is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.” *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). Where “a contract is ‘in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact,’ the intention of the parties is a question of law[.]” *Vue-Charlotte, LLC v. Sherman*, __ N.C. App. __, __, 719 S.E.2d 161, 163 (2011) (citation omitted).

Mr. Sedlacek relies on paragraph 16 of the Severance Agreement which provides as follows:

16. Governing Law. This Agreement and any amendments hereof shall be governed and interpreted in accordance with the laws (both substantive and procedural) of the

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State of North Carolina and without regard to any conflict of laws provisions. Each of the parties to this Agreement irrevocably consents to the exclusive jurisdiction and venue of any state or federal court of the State of North Carolina permitted by law to have jurisdiction over any and all actions between or among any of the parties, whether arising hereunder or otherwise, except as otherwise directed by such court. . . .

Mr. Sedlacek asserts in his brief that this provision “clearly states that North Carolina law will apply substantively and procedurally to any and all actions between the parties, whether arising under the Severance Agreement or otherwise.” We disagree.

We interpret paragraph 16 as indicative of the parties’ intent that “*This Agreement*,” i.e., the Severance Agreement, “be governed and interpreted in accordance with” North Carolina law. Further, the language “any and all actions between or among any of the parties, whether arising hereunder or otherwise” – to which Defendant directs this Court’s attention – does not support Defendant’s position that North Carolina law will govern any action between or among the parties. Rather, this provision reveals only that the parties intended North Carolina courts to have “*exclusive jurisdiction and venue*” over any such action. In other words, this provision evidences the parties’ intent that any action between or among them be *heard in North Carolina*, not that any such action be governed by North Carolina law.

This interpretation is reinforced when construing paragraph 16 in conjunction with paragraph 8, which provides as follows:

8. Non-disparagement, Non-Solicitation, Non-Competition, and Confidentiality. In connection [with Mr. Sedlacek’s] termination, [Defendant] . . . understands and acknowledges that all of his duties as a consultant of [Northern Star] ceased on the Separation Date, except that all obligations, including all non-disclosure, non-solicitation and non-competition obligations, that [Mr. Sedlacek] owes to [Northern Star], under law or any agreement [Mr. Sedlacek] has with [Northern Star], will continue after the Separation Date pursuant to the terms of those laws and/or agreements.

We believe the language in paragraph 8 reflects the parties’ intent that Mr. Sedlacek remain bound by all previously assumed “non-competition obligations,” including, but not limited to, the covenants in the 2010

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Agreements. We note that neither this provision nor any other provision in the Severance Agreement seeks to redefine Mr. Sedlacek's "non-competition obligations"; rather, as paragraph 8 states, such obligations "will continue . . . pursuant to the terms of *those . . . agreements*." (Emphasis added). Both 2010 Agreements specify that Mr. Sedlacek's "non-competition obligations" are to be defined with reference to New Jersey law, which includes the approach employed by New Jersey courts of permitting the trial court to rewrite an otherwise unreasonably restrictive covenant. Thus, to accept Mr. Sedlacek's position that the Severance Agreement superseded the prior agreements would also require this Court to accept the unlikely proposition that Northern Star intended to remove the non-compete covenants from the purview of New Jersey's flexible approach in favor of North Carolina's more restrictive approach, which does not permit the trial court to rewrite an overly broad restrictive covenant. *See, e.g., Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) ("The courts will not rewrite a contract if it is too broad but will simply not enforce it."). Thus, respecting the intent of the parties as manifested in the terms of their agreements, we hold that the trial court correctly concluded that New Jersey law governed its determination concerning the enforceability of the parties' non-compete covenants.

B. Covenants in Asset Purchase Agreement

[3] Mr. Sedlacek argues that the trial court erred in concluding that the covenants included in the 2010 Asset Purchase Agreement applied because they were superseded by the covenants set forth in the 2010 Consulting Agreement. We do not believe that this issue is properly before us, since the trial court only enjoined Mr. Sedlacek from continued violations of the covenants contained in the Consulting Agreement. Specifically, the trial court enjoined Mr. Sedlacek in three ways, ordering that he "refrain from (i) soliciting, servicing, selling, designing, developing, producing, forming, purchasing, administering, or procuring for third-parties Local, Intermediate and Long Haul Commercial Auto, Garage, Towing, Collateral Recovery (Repossession), Auto Dismantlers and Automobile Transporters insurance products . . . within the Restricted Area as defined by the 2010 Consulting Agreement; (ii) furnishing, divulging and/or making accessible to others Confidential Information as defined in the 2010 Consulting Agreement; and (iii) continuing to be a member of a partnership or a stockholder, investor, officer, director, employee, agent, associate or consultant or persons and entities engaging in the foregoing activities [described in the Consulting Agreement]." Accordingly, this argument is dismissed.

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C. Enforceability of Non-Compete Covenants

[4] Finally, Mr. Sedlacek argues that the covenants are not enforceable, even under New Jersey law. Under New Jersey law, a covenant not to compete is enforceable to the extent that it is “reasonable under the circumstances.” *Solari Indus., Inc. v. Malady*, 55 N.J. 571, 585, 264 A.2d 53, 61 (1970). To be deemed reasonable under the circumstances, a non-compete covenant (1) must be reasonably necessary to protect the employer’s legitimate interests; (2) must not cause undue hardship on the former employee; and (3) must not be contrary to the public interest. *Id.* New Jersey courts have stated that an “employer has no legitimate interest in preventing competition as such,” *Whitmyer Bros., Inc. v. Doyle*, 58 N.J. 25, 33, 274 A.2d 577 (1971), and, therefore, will not enforce “a restrictive agreement merely to aid the employer in extinguishing competition . . . from a former employee.” *Campbell Soup*, 58 F.Supp.2d at 489. However, New Jersey courts will enforce a non-compete provision where doing so is necessary to protect legitimate interests of the employer, for instance, the “employer’s interest in protecting trade secrets, confidential information, and customer relations.” *Ingersoll-Rand Co. v. Ciavatta*, 110 N.J. 609, 628, 542 A.2d 879 (1988). Further, the New Jersey Supreme Court has recognized that “employers may have legitimate interests in protecting information that is not a trade secret or proprietary information, but highly specialized, current information not generally known in the industry, created and stimulated by the research environment furnished by the employer, to which the employee has been exposed and enriched solely due to his employment.” *Id.* at 638, 542 A.2d 879 (internal quotation marks omitted).

Here, Mr. Sedlacek argues that the trial court’s order enforces a non-compete covenant that is overly broad as a matter of law. Northern Star counters that the non-compete covenant is not overly broad and that, in any event, Mr. Sedlacek’s contentions to the contrary are “premature because the Trial Court has not ruled that any of the restrictive covenants at issue are to be enforced in their entirety.”

We do not believe that Mr. Sedlacek’s challenges with respect to the enforceability of the non-compete covenant set forth in the Consulting Agreement are premature. *See, e.g., Coskey’s T.V. & Radio Sales v. Foti*, 253 N.J. Super. 626, 602 A.2d 789 (App. Div. 1992) (further limiting the scope of a non-compete covenant – after trial court had trimmed the covenant’s scope – upon review of the trial court’s preliminary injunction order). Accordingly, we address each portion of trial court’s injunction order.

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First, the trial court enjoined Mr. Sedlacek from engaging in certain insurance-related business activities within the areas described in the Consulting Agreement, namely, the fifty states, the District of Columbia and Puerto Rico. While the uncontested findings support the restrictions on the activities described, they do not support the geographic scope of those restrictions. Specifically, the trial court made no findings with respect to the geographic regions where Northern Star competes for business. Accordingly, we vacate and remand this portion of the injunction order for entry of findings with respect to the reasonableness of the geographic scope of the covenants as set forth in the Consulting Agreement, and to tailor the geographic scope of the restrictions to that area that is reasonable under the circumstances as supported by the court's findings.¹

Second, the trial court's order enjoins Mr. Sedlacek from divulging confidential information of Northern Star. However, Mr. Sedlacek does not make any argument challenging this portion of the injunction as unreasonable, and we accordingly do not address this portion of the order.

Third, the trial court's order enjoins Mr. Sedlacek from participating in essentially any capacity in any entity engaged in the activities described in the first portion of the injunction, *supra*. This portion of the order appears overly broad, in that, for instance, it prohibits Mr. Sedlacek from owning stock as a passive investor in a publicly traded company that engages in any of the insurance businesses described in the Consulting Agreement. We therefore vacate and remand this portion of the injunction order for entry of findings and conclusions with respect to the reasonableness of the scope of these restrictions.

1. We note that the covenants at issue contain a provision assigning a duration of ten years to the restrictions set forth therein. If North Carolina law were applicable, it would be appropriate to consider the reasonableness of this ten-year duration at the preliminary injunction stage of these proceedings. That is, if the ten-year duration were determined to be unreasonable, then, applying North Carolina law, the covenants would be unenforceable and a preliminary injunction would be inappropriate. Here, however, New Jersey law applies, and the preliminary injunction enforces the covenant only until the propriety of a permanent injunction is presented for consideration by the trial court. It will be necessary at that time for the trial court to inquire into the reasonableness of the ten-year duration of the covenants.

SARNO v. SARNO

[235 N.C. App. 597 (2014)]

V. Conclusion

In light of the foregoing, we vacate the trial court's preliminary injunction order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judge STROUD and Judge HUNTER, JR. concur.

MICHELLE D. SARNO, PLAINTIFF
v.
VINCENT J. SARNO, DEFENDANT

No. COA13-1472

Filed 19 August 2014

Appeal and Error—interlocutory orders and appeals—pending motion to modify child custody—failure to argue substantial right

Both parties' appeals in a child custody case were from an interlocutory order based on plaintiff's outstanding motion to modify custody. The parties failed to argue a substantial right would be affected absent immediate review, and thus, their appeals were dismissed.

Appeal by Plaintiff and Defendant from Order entered 24 April 2013 by Judge Ronald L. Chapman in District Court, Mecklenburg County. Heard in the Court of Appeals 4 June 2014.

The Law Office of Richard B. Johnson, P.A., by Richard B. Johnson, for plaintiff-appellant, cross-appellee.

Krusch & Sellers, P.A., by Rebecca K. Watts, for defendant-appellee, cross-appellant.

STROUD, Judge.

Plaintiff and defendant each appeal from an order for permanent child support and attorney fees. Because the order from which the parties have appealed is interlocutory and they have failed to argue that

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[235 N.C. App. 597 (2014)]

they are entitled to an interlocutory appeal based upon impairment of a substantial right, we dismiss both parties' appeals.

I. Background

Plaintiff and defendant were married in 2000 and one child was born to their marriage, in 2003. They separated in 2006 and later divorced. In 2009, plaintiff filed a complaint including claims for child custody and support, and defendant filed an answer and counterclaims also seeking custody, child support, and attorney's fees. Trial on the issues of child support and custody began on 6 June 2011 and 7 June 2011. On 23 March 2012, the trial court entered an order of permanent child custody, which specifically reserved the issue of child support for later determination. In the custody order, the trial court concluded that "[t]here was insufficient time to hear evidence and rule on claims for child support and attorney fees and the court retains jurisdiction to rule on this issue." On 24 July 2012, plaintiff filed a motion to modify custody based on several alleged changes of circumstances, including claims that the custody order was based upon the fact that plaintiff had planned to move to Vermont at the time of the June 2011 hearing, but she had since decided to remain in North Carolina.

The trial court resumed trial on the issue of permanent child support on 14 September 2012. On 24 April 2013, the trial court entered an order for permanent child support and attorney fees. In this order, the trial court found that plaintiff's motion to modify custody, filed on 24 July 2012, was still pending. The trial court found that at the 2011 trial, plaintiff had maintained "with certainty" that she would relocate to Vermont on 15 July 2011 and sought primary custody of the minor child. The permanent custody order had awarded primary custody of the child to defendant and had set a visitation schedule based upon the fact that plaintiff would be residing in Vermont and the defendant and child in North Carolina, with "extended time in the summers and school holidays" but "not enough overnights" to require that plaintiff's child support be established under Schedule B of the Child Support Guidelines.

The trial court also found that despite the visitation schedule established in the custody order, since plaintiff had remained in North Carolina, she had actually exercised additional weekend visitation during the school year, beyond that dictated by the custody order. The trial court found that "plaintiff's testimony of her overnights did not convince the court of an exact amount of parenting time" and that defendant's theory for calculating the parties' overnights was "confusing." The trial court found that plaintiff had 135 overnight visits per year, sufficient

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for child support to be set on Worksheet B, but based upon the uncertainty of the exact amount of visitation as well as additional findings of fact regarding the parties' financial situations and sharing of expenses, established child support accordingly, based upon Schedule A. The trial court also found that "while there is a motion to modify custody outstanding, child support needs to be established based on the current order and practice of the parties."

The trial court also made findings, when addressing the issue of attorney's fees, as to the delay in the progress of the case. The court found that "procedurally, this case has been slowed by the heavy case load of the court system, trial strategy decisions by the Plaintiff's counsel, the health issues of the prior trial counsel, as well as personal decisions by Plaintiff." One of these decisions was that "after receiving an undesirable result in the custody [matter], Plaintiff changed course, and opted to stay in North Carolina, presumably believing that this would negate the effects of the Court's ruling." According to the record before us, plaintiff's motion for modification of custody remains outstanding.

II. Interlocutory Order

Although neither party has raised the issue, it is apparent from the provisions of the child support order on appeal that we must first consider whether this order is a final, appealable order.

Generally, there is no right of immediate appeal from interlocutory orders and judgments. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. On the other hand, a final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.

Hausle v. Hausle, ___ N.C. App. ___, ___, 739 S.E.2d 203, 205-06 (2013) (citations and quotation marks omitted). "The reason for this rule is to prevent fragmentary, premature, and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Peters v. Peters*, ___ N.C. App. ___, ___, 754 S.E.2d 437, 439 (2014) (citation, quotation marks, and brackets omitted). "In the child support context, an order setting child support is not a final order for purposes of appeal until no further action is necessary before the trial court upon the motion or pleading then being considered." *Banner v. Hatcher*, 124 N.C. App. 439, 441, 477 S.E.2d 249, 250 (1996).

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We have said in the child custody context that

[a] trial court's label of a custody order as "temporary" is not dispositive. A custody order is, in fact, temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.

Sood v. Sood, ___ N.C. App. ___, ___, 732 S.E.2d 603, 606 (2012) (citations and quotation marks omitted), *cert. and disc. rev. denied, and app. dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012). These rules logically apply to the child support context as well. Indeed, support and custody are normally addressed in the same order if the two claims are heard at the same trial, as they were here. The unusual procedural feature here was the bifurcation of the issues by issuing two separate orders based upon the one trial, with plaintiff's motion to modify custody being filed in between the first and second sessions of the trial. This unusual procedural posture was created by a combination of the plaintiff's actions and circumstances beyond the control of the parties or the trial court, but still it resulted in an order which fails to provide a complete resolution of all issues.

Although the child support order was labeled as a "permanent" order and did not set a specific hearing date for a hearing upon plaintiff's pending motion, the provisions of the order address in detail some of the changes in circumstances since the custody order, such as plaintiff's decision to remain in North Carolina, which may necessitate additional change in the child support obligation as well. In fact, one of the primary issues was how much custodial time is being exercised by plaintiff, including consideration of the actual visitation, as practiced by the parties, compared to the visitation dictated by the existing custody order, and the establishment of child support depends heavily upon this determination. This order did not resolve all pending issues, due to plaintiff's outstanding motion to modify custody, which the trial court acknowledged by various findings in the child support order addressing plaintiff's outstanding motion, clearly anticipating that the child support issue would need to be revisited after plaintiff's motion to modify is heard. Addressing the parties' contentions at this time would result in "fragmentary, premature, and unnecessary appeals[.]" *Peters*, ___ N.C. App. at ___, 754 S.E.2d at 439.

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[235 N.C. App. 601 (2014)]

For an interlocutory order to be immediately appealable, either the trial court must certify the case for immediate appeal or the appellant must demonstrate that a substantial right will be impaired by delay in the appeal. *Id.* The parties have not acknowledged that the order is interlocutory and have not made any argument as to any substantial interest which would be impaired by delay. *See id.* at ___, 754 S.E.2d at 441 (noting that orders affecting only “the financial repercussion of a separation or divorce” generally do not affect a substantial right). Therefore, both parties’ appeals must be dismissed.¹

III. Conclusion

For the foregoing reasons, we must dismiss plaintiff’s appeal as interlocutory.

DISMISSED.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA

v.

DANIEL MIRANDA

No. COA13-1374

Filed 19 August 2014

1. Drugs—trafficking in cocaine—sufficiency of indictment—subject matter jurisdiction

The trial court did not lack subject matter jurisdiction to try defendant and to enter judgment against him for the crime of trafficking in between 28 and 200 grams of cocaine by manufacturing even though defendant contended that the indictment was fatally defective. The relevant count in the indictment returned against defendant alleged all of the elements of the offense of trafficking in between 28 and 200 grams of cocaine by manufacturing.

1. We note that the Legislature recently enacted Session Law 2013-411, codified at N.C. Gen. Stat. § 50-19.1 (2013), which governs appeals of certain interlocutory family law orders. However, this statute only became effective 23 August 2013, after the order on appeal was entered. 2013 N.C. Sess. Laws ch. 411, § 2. Therefore, it does not apply here and we express no opinion on how it would affect our analysis.

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2. Drugs—trafficking in cocaine—failure to consider lesser-included offense—manufacturing cocaine—no plain error

The trial court did not commit plain error in a prosecution for trafficking in cocaine by manufacturing by failing to allow the jury to consider the issue of defendant's guilt of the lesser-included offense of manufacturing cocaine. There was no record support for the proposition that defendant engaged in manufacturing activities with respect to some amount of cocaine less than that necessary to establish his guilt of a trafficking offense.

3. Drugs—trafficking in cocaine—requested jury instruction—intent to deliver—no plain error

The trial court did not commit plain error by failing to instruct the jury that it had to find beyond a reasonable doubt that defendant manufactured cocaine with the intent to distribute before convicting him of that offense. Defendant failed to establish that a different outcome would probably have been reached had the instruction been delivered at trial.

4. Drugs—trafficking in cocaine—manufacturing—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of trafficking between 28 and 200 grams of cocaine by manufacturing. The State's evidence showed that more than 28 grams of cocaine and several items that are commonly used to weigh, separate, and package cocaine for sale were seized from defendant's bedroom; and that the cocaine and cocaine-related mixture found in the pill bottle located behind the mirror in defendant's bedroom were packaged in plastic bags.

Appeal by defendant from judgment entered 2 August 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 19 March 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Melody R. Hairston, for the State.

N.C. Prisoner Legal Services, by Mary E. McNeill, for Defendant.

ERVIN, Judge.

Defendant Daniel Miranda appeals from a judgment entered based upon his convictions for trafficking in between 28 and 200 grams of

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cocaine by manufacturing and felonious possession of cocaine. On appeal, Defendant argues that the trafficking in cocaine by manufacturing indictment that had been returned against him was fatally defective, that the trial court committed plain error by failing to instruct the jury concerning the issue of his guilt of the lesser included offense of manufacturing cocaine, that the trial court committed plain error by failing to instruct the jury that a conviction for trafficking in cocaine by manufacturing based upon compounding required a finding that Defendant intended to distribute the substance in question, and that the record did not contain sufficient evidence to support his conviction for trafficking in cocaine by manufacturing. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background**A. Substantive Facts**

On 19 July 2012, Detectives Randall Ackley and Brad Gillis of the Johnston County Sheriff's Office went to Defendant's mobile home in Benson. Upon arriving at that location, the investigating officers met Defendant and his sister, informed Defendant that they had come to his residence for the purpose of serving outstanding warrants, and asked Defendant to identify the room that he occupied. In response to this inquiry, Defendant indicated that he occupied a room located at the far end of the mobile home.

After Defendant's father arrived at the residence, he consented to allow the investigating officers to conduct a search of the mobile home. As a result, Defendant led Detective Ackley into the interior of the mobile home and down the hallway to his room. As he entered Defendant's bedroom, Detective Ackley observed the presence of several items that caused him to ask Defendant to leave the room and wait in the mobile home's living room with Detective Gillis while he conducted his search.

At the time that he initially inspected the bedroom, Detective Ackley noted a mirror that had been placed against the wall and observed an end table on which were situated cellular phones, two digital scales, and a bag containing a green leafy substance that Detective Ackley believed to be marijuana, based upon his training and experience. In addition, Detective Ackley found a box of plastic bags on the coffee table in the bedroom. After looking behind the mirror, Detective Ackley found an orange pill bottle that contained a white substance. After making this

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discovery, Detective Ackley repositioned the mirror and went to the living room to get Detective Gillis.

When the investigating officers reached Defendant's bedroom, Detective Ackley showed Detective Gillis what he had discovered on the table and behind the mirror and asked Defendant to enter the room. At that point, Detective Gillis asked Defendant if there were any other illegal items in his room and received a negative response. After the investigating officers seized the pill bottle, in which two plastic bags containing a white substance were situated, Detective Gillis told Defendant that he believed that the bottle contained a controlled substance and asked Defendant several times if he knew what the substance was. Although he initially claimed to be ignorant of the substance's identity, Defendant eventually said, "[i]t is what you said it is." A laboratory analysis of the contents of the pill bottle revealed the presence of two plastic bags, one of which contained approximately 21.5 grams of cocaine base and the other of which contained a mixture of rice and cocaine base weighing approximately 28.26 grams.

On 20 July 2012, the investigating officers conducted a videotaped interview of Defendant. During the interview, Detective Ackley informed Defendant that the investigating officers had seized a sufficiently large amount of controlled substances from his residence to suggest that he was selling cocaine. Although Defendant denied having sold a controlled substance, he did admit to having mixed rice with the cocaine base to eliminate the moisture contained in the cocaine base and placed the bag containing the combined substance in the pill bottle.

B. Procedural History

On 19 July 2012, a warrant for arrest was issued charging Defendant with trafficking in between 28 and 200 grams of cocaine by manufacturing; trafficking in between 28 and 200 grams of cocaine by possession; and maintaining a dwelling house for the purpose of keeping and selling a controlled substance. On 4 September 2012, the Johnston County grand jury returned a bill of indictment charging Defendant with trafficking in between 28 and 200 grams of cocaine by manufacturing; trafficking in between 28 and 200 grams of cocaine by possession; and maintaining a dwelling house for the purpose of keeping or selling a controlled substance. The charges against Defendant came on for trial before the trial court and a jury at the 31 July 2013 criminal session of Johnston County Superior Court. At the conclusion of the State's evidence, the trial court dismissed the charge of maintaining a dwelling house for the purpose of keeping or selling a controlled substance for

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insufficiency of the evidence. On 2 August 2013, the jury returned verdicts convicting Defendant of trafficking in between 28 and 200 grams of cocaine by manufacturing and felonious possession of cocaine. At the conclusion of the ensuing sentencing hearing, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to a term of 35 to 51 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal AnalysisA. Jurisdiction and Indictment

[1] In his first challenge to the trial court's judgment, Defendant contends that the trial court lacked subject matter jurisdiction to try him and to enter judgment against him for the crime of trafficking in between 28 and 200 grams of cocaine by manufacturing on the grounds that the indictment that purported to charge him with committing that offense was fatally defective. More specifically, Defendant contends that the trafficking in between 28 and 200 grams of cocaine by manufacturing indictment returned against him was fatally defective on the grounds that the indictment did not adequately describe the manner in which Defendant allegedly manufactured cocaine. Defendant's argument lacks merit.

1. Standard of Review

As the Supreme Court has previously stated, "[i]t is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). "It is well established that '[a]n indictment is fatally defective if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty.'" *State v. Land*, __ N.C. App. __, __, 733 S.E.2d 588, 591 (2012) (quoting *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399 (2003)), *disc. review denied in part*, __ N.C. __, 758 S.E.2d 851, *affirmed in part*, 366 N.C. 550, 742 S.E.2d 803 (2013). "As a general rule[,] a [charging instrument] following substantially the words of the statute is sufficient when it charges the essentials of the offense in a plain, intelligible, and explicit manner" unless "the statutory language fails to set forth the essentials of the offense," in which case "the statutory language must be supplemented by other allegations which plainly, intelligibly, and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the defendant and the court as to the offense intended to be charged." *State v. Barneycastle*, 61 N.C. App. 694, 697, 301 S.E.2d 711, 713 (1983) (citing *State v. Palmer*, 293 N.C. 633, 638-39, 239 S.E.2d

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406, 410 (1977), and *State v. Loesch*, 237 N.C. 611, 612, 75 S.E.2d 654, 655 (1953)). A convicted criminal defendant is entitled to challenge the sufficiency of the indictment upon which the trial court's judgment is based even if the challenge that the defendant wishes to assert on appeal was never raised in the trial court. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000) (stating that, "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court"). We "review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

2. Validity of Manufacturing Indictment

The indictment returned against Defendant in this case alleged that Defendant had "manufacture[ed] twenty-eight (28) grams or more, but less than two hundred (200) grams of a mixture containing cocaine[.]" A person is guilty of trafficking in cocaine by manufacturing if he or she manufactures 28 grams or more of cocaine or any mixture containing cocaine. N.C. Gen. Stat. § 90-95(h)(3). As a result, in order to establish a defendant's guilt of trafficking in between 28 and 200 grams of cocaine by manufacturing, the State must establish beyond a reasonable doubt that the defendant manufactured an amount of cocaine or a mixture containing cocaine that weighed between 28 and 200 grams. N.C. Gen. Stat. §90-95(h)(3). A defendant involved in the "production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means," including "any packaging or repackaging of the substance," has engaged in "manufacturing" for purposes of the cocaine trafficking statutes. N.C. Gen. Stat. § 90-87(15).

Although Defendant contends in his brief that the indictment purporting to charge him with trafficking in cocaine by manufacturing was fatally defective based upon the fact that it failed to specify the exact manner in which he allegedly manufactured cocaine or a cocaine-related mixture, Defendant has failed to cite any authority establishing the existence of such a requirement, and we have not identified any such authority in the course of our own research. On the contrary, the relevant count of the indictment that had been returned against Defendant in this case is clearly couched in the statutory language and alleges that Defendant's conduct encompassed each of the elements of the offense in question. Although Defendant is correct in noting that the indictment does not explicitly delineate the manner in which he manufactured cocaine or a

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cocaine-related mixture, the relevant statutory language creates a single offense consisting of the manufacturing of a controlled substance rather than multiple offenses depending on the exact manufacturing activity in which Defendant allegedly engaged. As a result, since the relevant count in the indictment returned against Defendant in this case alleges all of the elements of the offense of trafficking in between 28 and 200 grams of cocaine by manufacturing, we conclude that the indictment returned against Defendant was not fatally defective and sufficed to give the trial court jurisdiction to hear this case and enter judgment against Defendant based upon his conviction for trafficking in between 28 and 200 grams of cocaine by manufacturing.

B. Submission of Manufacturing Cocaine

[2] In his second challenge to the trial court's judgment, Defendant contends that the trial court committed plain error by failing to allow the jury to consider the issue of his guilt of the lesser included offense of manufacturing cocaine. More specifically, Defendant contends that, just as the trial court allowed the jury to consider the issue of Defendant's guilt of the lesser included offense of felonious possession of cocaine, it should have allowed the jury to consider the issue of his guilt of manufacturing cocaine given that the jury might have failed to find beyond a reasonable doubt that Defendant manufactured a mixture containing between 28 and 200 grams of cocaine. We do not find Defendant's argument persuasive.

1. Standard of Review

As he candidly acknowledges, Defendant did not object at trial to the trial court's failure to submit the issue of his guilt of manufacturing cocaine to the jury as a lesser included offense. For that reason, we are limited to determining whether the trial court's inaction constituted plain error. N.C.R. App. P. 10(a)(4); *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (stating that, "[b]ecause defendant failed to object to the jury instructions at trial, the standard of review therefore is plain error"), *cert. denied*, 359 N.C. 854, 619 S.E.2d 854 (2005). "A reversal for plain error is only appropriate in the most exceptional cases." *State v. Raines*, 362 N.C. 1, 16, 653 S.E.2d 126, 136 (2007) (citation and quotation marks omitted), *cert. denied*, 557 U.S. 934, 129 S. Ct. 2857, 174 L. Ed. 2d 601 (2009). "To show plain error, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (citation and quotation marks omitted), *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009).

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2. Relevant Legal Principles

A lesser included offense is one that “requires no proof beyond that which is required for conviction of the greater [offense].” *Brown v. Ohio*, 432 U.S. 161, 168, 97 S. Ct. 2221, 2226, 53 L. Ed. 2d 187, 196 (1977). A trial court must instruct the jury concerning the issue of the defendant’s guilt of a lesser included offense in the event that “(1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified.” *State v. White*, 142 N.C. App. 201, 205, 542 S.E.2d 265, 268 (2001) (citations omitted). As a result, a trial court should instruct the jury concerning the issue of a defendant’s guilt of a lesser included offense where “the evidence ‘would permit a jury rationally to find [the] [defendant] guilty of the lesser offense and acquit him of the greater,’” *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (quoting *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983), *overruled in part on other grounds in State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986)), with “[t]he determinative factor [being] what the State’s evidence tends to prove.” *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658.

It is well-established that the total “quantity of the mixture containing cocaine may be sufficient in itself to constitute a violation under N.C. Gen. Stat. § 90-95(h)(3).” *State v. Broome*, 136 N.C. App. 82, 86, 523 S.E.2d 448, 452 (1999) (holding that the defendant was properly convicted of trafficking in between 200 and 400 grams of cocaine by possession based upon the seizure of a package containing a cocaine mixture that, while weighing 273 grams, contained only 27 grams of pure cocaine), *disc. review denied*, 351 N.C. 362, 543 S.E.2d 136 (2000); *State v. Tyndall*, 55 N.C. App. 57, 60-61, 284 S.E.2d 575, 577 (1981). As a result, in a case in which the defendant has been charged with trafficking in between 28 and 200 grams of a cocaine mixture, the State need not prove that the mixture contained between 28 and 200 grams of cocaine; instead, the State need only prove that the mixture, considered as a whole, met the relevant weight standard.

3. Evidentiary Analysis

The undisputed record evidence indicates that Defendant admitted having added rice to some portion of the cocaine base that was in his possession for the purpose of removing moisture from that substance and having placed the bag containing the mixture of rice and cocaine base into the pill bottle discovered by investigating officers. Although

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Defendant argues that a combination of cocaine base and rice does not constitute a “mixture” as that term is used in our trafficking statutes, he cites no authority in support of that assertion, we have found no support for that assertion in the course of our own research, and the statutory reference to a “mixture” appears to us to encompass the mixture of a controlled substance with any other substance regardless of the reason for which that mixture was prepared. In addition, various items used to weigh and package controlled substances were found by investigating officers in Defendant’s bedroom. As a result, the undisputed record evidence clearly establishes that Defendant engaged in “manufacturing” as that term is used in N.C. Gen. Stat. § 95-87(15) with respect to more than 28 grams of cocaine or a mixture containing cocaine. In addition, there is no record support for the proposition that Defendant engaged in manufacturing activities with respect to some amount of cocaine less than that necessary to establish his guilt of a trafficking offense. For that reason, Defendant’s argument rests upon a contention that the jury could have chosen to refrain from believing some portion of the State’s evidence while believing the rest of it, an approach that we have consistently held to be insufficient to support the submission of a lesser included offense. As a result, despite its decision to submit the issue of Defendant’s guilt of the lesser included offense of felonious possession of cocaine for the jury’s consideration on the basis of similar logic, the trial court did not err, much less commit plain error, by failing to allow the jury to consider the issue of Defendant’s guilt of the lesser included offense of manufacturing cocaine.

C. Trafficking by Manufacturing Instruction

[3] In his third challenge to the trial court’s judgment, Defendant contends that the trial court committed plain error by failing to instruct the jury that it had to find beyond a reasonable doubt that Defendant manufactured cocaine with the intent to distribute before convicting him of that offense. More specifically, Defendant contends that, in order to find him guilty of trafficking in between 28 and 200 grams of cocaine by manufacturing on the basis of compounding, the jury was required to find that Defendant acted with the intent to distribute. Defendant is not entitled to relief from the trial court’s judgment on the basis of this argument.

1. Standard of Review

As he once again candidly admits, Defendant did not object to the trial court’s failure to instruct the jury that it had to find beyond a reasonable doubt that he had an intent to distribute in order to convict him

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of trafficking in between 28 and 200 grams of cocaine by manufacturing based upon compounding. For that reason, we are, once again, required to utilize a plain error standard of review in evaluating the validity of Defendant's contention. N.C.R. App. P. 10(a)(4); *Goforth*, 170 N.C. App. at 587, 614 S.E.2d at 315.

2. Plain Error Analysis

As Defendant notes, we have held that, "where the defendant is charged with manufacture of a controlled substance and the activity constituting manufacture is preparation or compounding," the State must prove the existence of any intent to distribute the controlled substance. *State v. Childers*, 41 N.C. App. 729, 732, 255 S.E.2d 654, 656, *cert. denied*, 298 N.C. 302, 259 S.E.2d 916 (1979). Although the State has responded by arguing that the holding in *Childers* does not apply in this case given that Defendant had been charged with trafficking in cocaine by manufacturing in violation of N.C. Gen. Stat. § 90-95(h)(3) rather than felonious manufacturing of cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1) and that the requirement that the State prove beyond a reasonable doubt that Defendant's activities involved between 28 and 200 grams of cocaine and a cocaine-related mixture obviates the necessity to prove an intent to distribute given that "[o]ur legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale," *Tyndall*, 55 N.C. App. at 60-61, 284 S.E.2d at 577, we need not reach this issue in light of our recognition that the trial court allowed the jury to find that Defendant engaged in manufacturing-related activities based on packaging and repackaging as well as compounding and the fact that the undisputed record evidence shows that Defendant placed the cocaine-related mixture in the pill bottle and possessed items used to weigh and package controlled substances in the vicinity of a substantial amount of cocaine base and a cocaine-related mixture. As a result, since we do not believe that Defendant has established that a different outcome would probably have been reached had the instruction at issue here been delivered at trial, we conclude that Defendant is not entitled to relief on the basis of this argument.

D. Sufficiency of the Evidence

[4] In his final challenge to the trial court's judgment, Defendant contends that the trial court erred by denying his motion to dismiss the trafficking in between 28 and 200 grams of cocaine by manufacturing charge for insufficiency of the evidence. More specifically, Defendant contends

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that the trial court should have dismissed the trafficking in between 28 and 200 grams of cocaine by manufacturing charge on the grounds that the evidence did not suffice to support a determination that Defendant had packaged or repackaged cocaine or a cocaine-related mixture or that Defendant had compounded a sufficient quantity of cocaine or a cocaine-related mixture with the intent to distribute. Once again, we conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Wallace*, 197 N.C. App. 339, 343, 676 S.E.2d 922, 925 (2009) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 804 (2006) (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001)). In making the required sufficiency determination, the record evidence presented must be viewed "in the light most favorable to the State." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000).

2. Relevant Legal Principles

As we have already noted, the statutory definition of "manufacturing" "includes any packaging or repackaging of the [controlled] substance[.]" N.C. Gen. Stat. § 90-87(15). "[T]his Court has held that there was sufficient evidence of manufacturing where the instruments of manufacture are found together with cocaine which was apparently manufactured." *State v. Outlaw*, 96 N.C. App. 192, 198, 385 S.E.2d 165, 169 (1989), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118 (1990). As a result, in the event that investigating officers find cocaine or a cocaine-related mixture and an array of items used to package and distribute that substance, the evidence suffices to support a manufacturing conviction. *See Brown*, 64 N.C. App. at 640-41, 308 S.E.2d at 348-49 (holding that evidence, such as plastic bags and tinfoil, found on the defendant's table in connection with his constructive possession of cocaine was sufficient to support a manufacturing conviction).

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3. Sufficiency Analysis

According to the undisputed record evidence, investigating officers found a pill bottle that housed a bag containing 21 grams of cocaine base and a second bag containing a mixture of rice and cocaine base that weighed 28.26 grams behind a mirror in Defendant's bedroom. In addition, investigating officers seized two digital scales and boxes of plastic bags from the same room. As Detective Ackley testified, plastic bags, in conjunction with digital scales, are used for the separation of controlled substances and as a "method of distribution." Defendant acknowledged having placed the bag containing the mixture of cocaine base and rice in the pill bottle. As a result, given that the State's evidence showed that more than 28 grams of cocaine and several items that are commonly used to weigh, separate, and package cocaine for sale were seized from Defendant's bedroom; that the cocaine and cocaine-related mixture found in the pill bottle located behind the mirror in Defendant's bedroom were packaged in plastic bags; and that our prior decisions in *Outlaw* and *Brown* indicate that such evidence is sufficient to support a manufacturing conviction on the basis of packaging and repackaging,¹ we conclude that the trial court did not err by denying Defendant's dismissal motion.

In seeking to persuade us to reach a different result, Defendant contends that there was no indication that the plastic bags and digital scales found in his bedroom were used in packaging the cocaine found behind the mirror. Instead, Defendant asserts that digital scales and plastic bags are not "unique to the manufacture of cocaine" and might have been used solely for the purpose of weighing and packaging the marijuana that was discovered in his bedroom. Although Defendant's argument rests upon an accurate description of the record evidence, the inference that he wishes us to draw is not the only interpretation that a reasonable juror could have adopted after hearing and analyzing the State's case. Instead, the argument upon which Defendant relies amounts to a challenge to the weight that the jury should have given to the evidence rather than to its sufficiency. As a result, the trial court appropriately denied Defendant's dismissal motion.

1. In view of our determination that the record supports a finding that Defendant packaged or repackaged the cocaine and cocaine-related mixture found in his bedroom, we need not analyze the sufficiency of the evidence to show that Defendant engaged in compounding-related activities as well.

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III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

AFFIRMED.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
ANTHONY PRESSLEY

No. COA13-1248

Filed 19 August 2014

1. Sexual Offenders—failure to register—false information on verification forms

The trial court did not err in a failure to register as a sex offender case by denying defendant's motion to dismiss based on the State's failure to show that one of the forms containing false information was actually required by law to be submitted. The schedule in N.C.G.S. § 14-208.9A does not excuse the provision of false information on verification forms submitted on other dates.

2. Sexual Offenders—failure to register—requested jury instruction—statutory intervals to submit forms

The trial court did not commit plain error in a failure to register as a sex offender case by failing to instruct the jury regarding the statutorily designated intervals at which such forms must be submitted. Because the statutory prohibition against sex offenders providing a false address to law enforcement officers applies to verification forms submitted at any time, there was no reason for the trial court to instruct the jury in the manner asserted by defendant.

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3. Sexual Offenders—failure to register—motion to dismiss—submission of each form a distinct violation

The trial court did not err in a failure to register as a sex offender case by denying defendant's motion to dismiss based on his contention that he was charged twice for the same offense. The submission of each form constituted a distinct violation of N.C.G.S. § 14-208.11(a)(4).

Appeal by defendant from judgments entered 11 June 2013 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 6 March 2014.

Roy Cooper, Attorney General, by Hal F. Askins, Special Deputy Attorney General, for the State.

Gilda C. Rodriguez for defendant-appellant.

DAVIS, Judge.

Anthony Pressley (“Defendant”) appeals from judgments entered upon a jury verdict finding him guilty of two counts of failure to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.11, based on his listing of a false address on forms submitted to law enforcement officers following his release from prison. Defendant argues on appeal that the trial court (1) erred in denying his motion to dismiss based on the State’s failure to show that one of the forms containing false information was actually required by law to be submitted; (2) committed plain error in failing to instruct the jury regarding the statutorily designated intervals at which such forms must be submitted; and (3) erred in denying his motion to dismiss based on his contention that he was charged twice for the same offense. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State’s evidence at trial tended to establish the following facts: Defendant was previously found guilty in Rowan County Superior Court of taking indecent liberties with a child. He was sentenced to a term of 19-23 months imprisonment and was released from prison on 23 April 2012. Pursuant to N.C. Gen. Stat. § 14-208.7, Defendant – as a convicted sex offender – was required to provide, upon his release from prison, a signed form to the sheriff of his county of residence containing, *inter alia*, the following information:

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The person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, drivers license number, *and home address*.

N.C. Gen. Stat. § 14-208.7(b)(1) (2013) (emphasis added).

Upon his release from prison on 23 April 2012, Defendant registered with the Rowan County Sheriff's Office, listing his residence on the form as 364 Culbertson Estate's Drive, Woodleaf, North Carolina, which was the address of his mother's home. On 4 June 2012, at the written direction of the State Bureau of Investigation, Defendant signed an additional verification of information form, continuing to list this same address.

On 3 July 2012, David Allen ("Chief Allen"), the Chief of Police for the Town of Cleveland, North Carolina, was investigating an unrelated case and came to the 364 Culbertson Estate's Drive residence to interview Defendant. Chief Allen spoke with Joseph Nathan Rankin ("Rankin"), Defendant's stepfather, who informed him that Defendant did not live there.

On 23 July 2012, Chief Allen again spoke with Rankin, who provided a written statement that Defendant (1) did not live at 364 Culbertson Estate's Drive; (2) had used that address on the forms because he "needed an address to provide"; and (3) "ha[d] only spent the night at [the] house one time since he was released from prison." Rankin later clarified that Defendant had stayed with him and Defendant's mother at the residence for two days between 23 April 2012, the date of his release from prison, and 23 July 2012, the date of Rankin's statement.

Chief Allen also spoke with James Alonzo Lewis, who signed a statement indicating that Defendant had lived with him at 106 Crowder Street in Cleveland, North Carolina "for about three months" after his release from prison but subsequently left the residence after a dispute over bills. In addition, Chief Allen talked with Latisha Vaughan, who provided a written statement attesting to the fact that Defendant "started staying at [her] apartment near the end of May 2012" and moved out in August of 2012.

On 29 October 2012, Defendant was indicted on two counts of failure to register as a sex offender pursuant to N.C. Gen. Stat. § 14-208.11 with regard to the signed forms he submitted on 23 April 2012 and on 4 June 2012. A jury trial was held on 11 June 2013 in Rowan County Superior Court. The jury convicted Defendant on both counts, and the trial court entered judgments upon the jury verdicts. Defendant was sentenced to two consecutive sentences of 23-37 months imprisonment. Defendant gave notice of appeal in open court.

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[235 N.C. App. 613 (2014)]

Analysis

I. Denial of Motion to Dismiss Based on State's Failure to Prove That Submission of 4 June 2012 Verification Form Was Required by Statute

[1] The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citations and quotations omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Defendant initially contends that the trial court erred in denying his motion to dismiss because the State failed to prove that the 4 June 2012 verification form he submitted was "required" by statute. We disagree.

Defendant was charged with violating N.C. Gen. Stat. § 14-208.11, which is a part of North Carolina's Sex Offender Registration Act ("the Act"), codified at N.C. Gen. Stat. § 14-208.5 *et seq.* N.C. Gen. Stat. § 14-208.9A provides that, beginning on the date of his initial registration and every six months thereafter, a person required to register under the Act must submit a verification form to the sheriff of his county of residence within three business days of receiving it. The form must be signed and must indicate, among other things, "[w]hether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address." N.C. Gen. Stat. § 14-208.9A (2013). The statute Defendant was charged with violating, N.C. Gen. Stat. § 14-208.11, further states, in pertinent part, that:

A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:

....

(4) Forges or submits under false pretenses the information or verification notices required under this Article.

N.C. Gen. Stat. § 14-208.11(a)(4) (2013).

Defendant does not argue that the address he listed on the 23 April 2012 and 4 June 2012 forms was correct. Rather, he contends that the

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4 June 2012 form was not required to be submitted under N.C. Gen. Stat. § 14-208.9A because, under that statute, verification forms must only be submitted every six months subsequent to the date of the initial registration form.

Defendant's argument, while novel, lacks merit. The clear and unambiguous purpose of the Act is

to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2013).

As a part of this statutory scheme, N.C. Gen. Stat. § 14-208.9A is intended to ensure that law enforcement officers possess complete and accurate information as to the addresses of convicted sex offenders living in North Carolina. This intent is reinforced by N.C. Gen. Stat. § 14-208.9A(b), which provides, in relevant part, as follows:

Additional Verification May Be Required.—During the period that an offender is required to be registered under this Article, the sheriff is authorized to attempt to verify that the offender continues to reside at the address last registered by the offender.

N.C. Gen. Stat. § 14-208.9A(b).

The only rational reading of N.C. Gen. Stat. § 14-208.11 is that it criminalizes the provision of false or misleading information on forms submitted pursuant to the Act – regardless of when these forms are submitted. The schedule of deadlines set out in N.C. Gen. Stat. § 14-208.9A is simply designed to provide a reliable timetable for the filing of verification forms. The inclusion of this schedule in N.C. Gen. Stat. § 14-208.9A does not excuse the provision of false information on verification forms submitted on other dates. Indeed, Defendant's argument, if accepted, would permit the submission of false or misleading information to law enforcement agencies on forms submitted at time intervals different than those explicitly set out in the statute. We decline to adopt a construction of the statute that would both thwart the express intent of

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the General Assembly and fly in the face of common sense. *See State v. Jones*, 359 N.C. 832, 837, 616 S.E.2d 496, 499 (2005) (holding that “[i]n construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results” (citation omitted)). Accordingly, we hold that the trial court did not err in denying Defendant’s motion to dismiss based on the State’s failure to prove that Defendant was required by statute to submit the 4 June 2012 verification form on that date.

II. Jury Instructions

[2] In his second argument, Defendant contends that the trial court committed plain error by failing to instruct the jury that the 4 June 2012 verification form was not required to be submitted on that date based on the timetable set out in N.C. Gen. Stat. § 14-208.9A. Because Defendant did not request a jury instruction on this issue, we review this argument only for plain error. *See State v. McClary*, 198 N.C. App. 169, 175, 679 S.E.2d 414, 419 (2009) (“Plain error review is only available in criminal cases and is limited to errors in jury instructions or rulings on the admissibility of evidence.”).

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citations and quotations omitted).

This argument is foreclosed by our ruling on Defendant’s first issue on appeal. By arguing that the trial court erred in declining to instruct the jury that N.C. Gen. Stat. § 14-208.9A did not require Defendant to submit a verification form on 4 June 2012, Defendant is essentially re-arguing his earlier contention that accurate information is required *only* on verification forms submitted in strict accordance with the timetable

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set out in N.C. Gen. Stat. § 14-208.9A. In light of the fact that we have rejected that argument, it logically follows that the trial court did not commit plain error by declining to instruct the jury as to this fact.

Because the statutory prohibition against sex offenders providing a false address to law enforcement officers applies to verification forms submitted *at any time*, there was no reason for the trial court to instruct the jury in the manner asserted by Defendant. Accordingly, we hold that the trial court did not commit plain error in its jury instructions.

III. Denial of Motion to Dismiss Based on Continuing Offense Theory

[3] In his final argument, Defendant contends that the trial court erred in denying his motion to dismiss because he was charged twice for the same offense. This argument is also meritless.

Defendant characterizes the two offenses for which he was convicted as one continuing offense such that he could not lawfully be convicted twice on these facts. However, Defendant's argument ignores the fact that – on two separate occasions – he submitted verification forms that contained false information regarding his address. The submission of each of these forms constituted a distinct violation of N.C. Gen. Stat. § 14-208.11(a)(4). Consequently, we conclude that the trial court did not err in denying Defendant's motion to dismiss based on this theory.

Conclusion

For the reasons stated above, we hold that Defendant received a fair trial free from error.

NO ERROR.

Judges CALABRIA and STROUD concur.

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[235 N.C. App. 620 (2014)]

SURGICAL CARE AFFILIATES, LLC AND BLUE RIDGE
DAY SURGERY CENTER, L.P., PETITIONERS

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF
HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION,
RESPONDENT AND WAKEMED, RESPONDENT-INTERVENOR

No. COA13-1322

Filed 19 August 2014

**Hospitals and Other Medical Facilities—certificate of need—
relocation of operating rooms—substantial prejudice—
not shown**

In a certificate of need case involving the proposed relocation of two specialty ambulatory operating rooms by WakeMed, petitioners failed to show that the respondent's decision to grant WakeMed's application resulted in substantial prejudice, a necessary element of petitioner's attempt to successfully oppose the Agency decision.

Appeal by Petitioners from Final Decision entered 23 July 2013 by Judge Eugene J. Cella in the Office of Administrative Hearings. Heard in the Court of Appeals 23 April 2014.

Nexsen Pruet, PLLC, by Frank S. Kirschbaum, Robert A. Hamill, and Rachael Lewis Anna, for Petitioners.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for Respondent.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray, Terrill Johnson Harris, and Carrie A. Hanger for Respondent-Intervenor.

STEPHENS, Judge.

Background

This case involves the proposed relocation of two specialty ambulatory operating rooms from Southern Eye Ophthalmic Surgery Center ("Southern Eye")¹ to the WakeMed health care system's Raleigh Campus,

1. A specialty ambulatory operating room is a surgical facility that is used for single-day, outpatient surgical procedures limited to one specialty area. *See* N.C. Gen. Stat. § 131E-176(1b), (24f) (2013). For Southern Eye, that specialty is ophthalmic surgery.

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where the operating rooms would be used as “shared operating rooms” for inpatients and outpatients. WakeMed is a nonprofit corporation that owns and operates multiple health care facilities in the Triangle region of North Carolina. WakeMed purchased Southern Eye on 10 May 2012 with the intention of relocating its operating rooms to WakeMed Raleigh. Petitioners Surgical Care Affiliates, LLC (“SCA”) and Blue Ridge Day Surgery Center, L.P. (“Blue Ridge”)² operate a multispecialty ambulatory surgical facility in Raleigh,³ are direct competitors with WakeMed, and contest the proposed relocation of these rooms.

WakeMed filed a certificate of need (“CON”) application with the North Carolina Department of Health and Human Services (“the Agency”) on 16 April 2012, officially proposing to move the two operating rooms to its Raleigh Campus. The Agency conditionally granted that application on 27 September 2012. Following the Agency’s decision, SCA and Blue Ridge petitioned for a contested case hearing to challenge the decision.⁴ An administrative law judge with the Office of Administrative Hearings (“the ALJ”) heard the matter beginning 15 April 2013 and affirmed the Agency’s decision on 23 July 2013 by final decision. Petitioners appeal from the ALJ’s final decision.

Discussion

On appeal, Petitioners argue that the ALJ erred in affirming the Agency’s decision because (1) the Agency failed to apply certain agency-created regulations, referred to by Petitioners as “the conversion rules,” to WakeMed’s CON application and (2) this failure “substantially prejudice[d] [Petitioners’] rights.” We affirm the decision of the ALJ on the issue of substantial prejudice and, therefore, do not reach the issue of the application of the conversion rules.

I. Standard of Review

“In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test.”

2. SCA is the managing partner of Blue Ridge and has an ownership interest in the partnership.

3. A multispecialty ambulatory surgical facility is a surgical facility that is used for same-day surgical procedures occurring over at least three defined specialty areas, including general surgery. *See* N.C. Gen. Stat. § 131E-176(15a).

4. A “contested case” is an “administrative proceeding [held under Chapter 150B of the North Carolina General Statutes] to resolve a dispute between an agency and another person that involves the person’s rights, duties, or privileges, including licensing or the levy of a monetary penalty.” N.C. Gen. Stat. § 150B-2(2) (2013).

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Diaz v. Div. of Soc. Servs., 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006) (citation omitted). Pursuant to section 150B-51 of the North Carolina General Statutes:

(b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under [sections] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) . . . , the court shall conduct its review of the final decision using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) . . . , the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)–(c) (2013) (*italics added*). “Under *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.” *McMillan v. Ryan Jackson Props., LLC*, __ N.C. App. __, __, 753 S.E.2d 373, 377 (2014) (citation and internal quotation marks omitted).

In applying the whole record test, the reviewing court is required to examine all competent evidence . . . in order to determine whether the [final] decision is supported

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by “substantial evidence.” Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs., 205 N.C. App. 529, 535, 696 S.E.2d 187, 192 (2010) (citations omitted), *disc. rev. denied*, __ N.C. __, 705 S.E.2d 753 (2011) [hereinafter *Parkway Urology*].

II. Substantial Prejudice

After the Agency decides to issue, deny, or withdraw a CON or exemption or to issue a CON pursuant to a settlement agreement, “any affected person [as defined by section 131E-188(c)] shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes.” *Id.* at 535, 696 S.E.2d at 192 (citation omitted). Subsection (c) defines an “affected person” as, *inter alios*, “any person who provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant.” N.C. Gen. Stat. § 131E-188(c) (2013). In addition to meeting this “prerequisite[] to filing a petition for a contested case hearing regarding CONs,” the petitioner must also satisfy “the actual framework for *deciding* the contested case [as laid out in section 150B-23(a) of] Article 3 of Chapter 150B of the General Statutes.” *Parkway Urology*, 205 N.C. App. at 536, 696 S.E.2d at 193 (citation omitted; emphasis in original).

Section 150B-23(a) of the North Carolina General Statutes provides that a petitioner must state facts in its petition which

tend[] to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise *substantially prejudiced* the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

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N.C. Gen. Stat. § 150B-23(a) (2013) (emphasis added).⁵ This Court has interpreted subsection (a) to mean that the ALJ in a contested case hearing must “determine whether the petitioner has met its burden in showing that the agency substantially prejudiced [the] petitioner’s rights.” *Parkway Urology*, 205 N.C. App. at 536, 696 S.E.2d at 193 (citation and emphasis omitted) (overruling the petitioner’s argument that it was not required to show substantial prejudice as long as it could show that it was an affected person). Therefore, under section 150B-23 and our opinion in *Parkway Urology*, a petitioner in a CON case must show (1) either that the agency (a) has deprived the petitioner of property, (b) ordered the petitioner to pay a fine or civil penalty, or (c) substantially prejudiced the petitioner’s rights, and (2) that the agency erred in one of the ways described above. See N.C. Gen. Stat. § 150B-23(a); 205 N.C. App. at 536, 696 S.E.2d at 193; see also *Caromont Health, Inc. v. N.C. Dep’t of Health & Human Servs.*, __ N.C. App. __, __, 751 S.E.2d 244, 248 (2013) (“The administrative law judge must, therefore, determine *whether the petitioner has met its burden in showing that the agency substantially prejudiced [the] petitioner’s rights*, as well as whether the agency *also acted* outside its authority, acted erroneously, acted arbitrarily and capriciously, *used improper procedure*, or failed to act as required by law or rule.”) (citation omitted; certain emphasis added).

Here, the ALJ concluded in the final decision that Petitioners were “‘affected persons’ because they provide surgical services that are similar to services provided by WakeMed,” and the parties do not dispute that conclusion. In addition, Petitioners do not argue that the Agency deprived them of property or ordered them to pay a fine or civil penalty. Rather, Petitioners contend that they were substantially prejudiced by the Agency’s decision, which was erroneously and improperly decided. Specifically, Petitioners argue that they were substantially prejudiced either (1) as a matter of law or, in the alternative, (2) because the Agency’s decision gives WakeMed an unfair competitive advantage amounting to substantial prejudice. We disagree.

(1) *Substantial Prejudice as a Matter of Law*

Petitioners contend that the Agency’s decision substantially prejudiced their rights as a matter of law because (a) the ALJ had already determined that Petitioners were substantially prejudiced and (b) the

5. Section 150B-23 was amended in 2013 to include an additional subsection. This amendment is unrelated to the issues raised by the parties in this appeal. See 2013 N.C. Sess. Laws 397, sec. 4.

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Agency's alleged failure to follow its own rules necessarily constitutes substantial prejudice as a matter of law. We are unpersuaded.

(a) The ALJ's Statement

Petitioners assert that the Agency's decision substantially prejudiced their rights as a matter of law because the ALJ made a finding to that effect during the contested case hearing. This argument takes the ALJ's statement out of context. Responding to WakeMed's motion for summary judgment, the ALJ made the following comment at the hearing:

The Court: All right. As far as this particular motion is concerned and ruling on the motion for summary judgment, I'm going to find that I think there is enough evidence on the record that there is substantial prejudice by not applying this rule and consequently deny the motion for summary judgment.

Following that ruling, Wakemed presented evidence, and Petitioners presented rebuttal witnesses. Afterward, the parties attempted to clarify the ALJ's initial ruling:

[Counsel for WakeMed]: . . . [I]t's our understanding, Your Honor, that you deferred — that you denied the motion [for summary judgment] and decided to have a hearing on the issue of whether the multispecialty rules applied. . . .

. . . .

The summary judgment motion that we filed was to say that they were not substantially prejudiced as a matter of law, and that was what was renewed yesterday and that you also denied. . . .

. . . .

The Court: I don't know that I can agree or disagree —

. . . .

— Without sitting down and thinking about it and looking at it.

[Counsel for the Agency]: I think, Judge . . . , that the heart of this is we understood that you did not grant summary judgment in favor of [SCA], but you also didn't grant summary judgment the other way and say that the Agency was

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correct on the rule. You said, "I'd go to trial[,] and I'll hear the evidence."

....

The Court: *I wasn't deciding on the merits, no.*

(Emphasis added). The ALJ's comments make clear that his preliminary ruling constituted a denial of Respondents' motion for summary judgment on grounds that Petitioners had presented enough evidence to proceed with the hearing. It was not a final determination on the merits and does not control or undermine the ALJ's ultimate, written determination, following the presentation of the parties' evidence, that Petitioners failed to show substantial prejudice. Accordingly, Petitioners' argument that the ALJ determined the issue of substantial prejudice in their favor at the contested case hearing is overruled.

(b) *Failure to Follow Rules as Substantial Prejudice*

Petitioners also argue that the Agency's alleged failure to apply its own rules constitutes substantial prejudice as a matter of law, citing *N.C. Dep't of Justice v. Eaker*, 90 N.C. App. 30, 367 S.E.2d 392 (1988), *overruled on other grounds*, *Batten v. N.C. Dep't of Corrs.*, 326 N.C. 338, 389 S.E.2d 35 (1990); *Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 1, 647 S.E.2d 651, *disc. review denied*, 361 N.C. 692, 654 S.E.2d 477–78 (2007) [hereinafter *Hospice at Greensboro*]; and *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 398 S.E.2d 466 (1990) [hereinafter *HCA Crossroads*] for support. This argument is without merit.

Petitioners cite *Eaker* for the rule that a plaintiff need not "show prejudice once he carries his burden of showing that the Department [of Justice] failed to follow the [State Personnel] Commission's policies," 90 N.C. App. at 37, 367 S.E.2d at 397, and seek to apply that rule here. In *Eaker*, the Department of Justice attempted to eliminate a research associate position in the Department's Sheriffs' Standards Division. 90 N.C. App. at 31, 367 S.E.2d at 394. The research associate position belonged to the petitioner, who sought a contested case hearing following his termination. *Id.* The petitioner alleged that the Department's actions were the result of political discrimination and "that the Department failed to comply with its own policies or those of the State Personnel Commission regarding 'reductions in force.'" *Id.* The State Personnel Commission rejected the petitioner's political discrimination claim, but agreed that the Department had failed to follow the Commission's policies for a reduction in force and recommended

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that the petitioner be reinstated to his position. *Id.* at 31–32, 367 S.E.2d at 394. The case was appealed to the trial court, which reversed the Commission on grounds that the Department had followed all mandatory policies for reductions in force and, even if it had not followed those policies, that the “petitioner had failed to show [prejudice in the form of] a substantial chance of a different result.” *Id.* at 32, 367 S.E.2d at 394.

On appeal, this Court reversed the trial court because it “improperly placed [the] burden on the Department [to prove that appropriate procedures for personnel reduction were utilized].” *Id.* at 36, 367 S.E.2d at 397. We also elected to address the Department’s remaining arguments and concluded that the petitioner “does not have to show prejudice once he carries his burden of showing that the Department failed to follow the Commission’s policies.” *Id.* at 37–38, 367 S.E.2d at 397–98. We reasoned that the Commission’s policies were promulgated pursuant to statutory authority and, thus, had “the force of law.” *Id.* Because the substance of those policies required the Department to consider a number of discretionary factors, however, we pointed out that a showing of prejudice would be “nearly impossible” for the petitioner to achieve. *Id.* Specifically, we observed that

[t]o show prejudice from failure to follow policy, [the] petitioner would have to show, not only how he stood in relation to other employees in the same class as to type of appointment, length of service, and work performance, but he would have to show the weight which the Department would attribute to each of those factors. The Commission and the reviewing court would be relegated to speculating how the Department would weigh each factor.

Id. at 38, 367 S.E.2d at 398. Therefore, we held that it was sufficient to show prejudice for the petitioner to establish that the Department failed to follow the mandatory policies of the Commission, which had been promulgated pursuant to statutory authority. *Id.* A separate showing of prejudice was unnecessary in that circumstance. *Id.*

Assuming without deciding that the *Eaker* opinion raises issues that are analogous to those in this case, its interpretation of prejudice is no longer applicable to section 150B-23(a) of Article 3 of the Administrative Procedure Act. The petitioner in *Eaker* submitted his petition to the State Personnel Commission on 24 April 1985. 1585 N.C. App. Records & Briefs No. 8710SC857, 2 (1987). At that time, Article 3 of Chapter 150 contained no requirement that a petitioner establish that it had been deprived of property, ordered to pay a fine or penalty, or substantially

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prejudiced *in addition* to showing that the agency exceeded its authority or jurisdiction, acted erroneously, *failed to use proper procedure*, acted arbitrarily and capriciously, or failed to act as required by law or rule. See 1973 N.C. Sess. Laws 1331, sec. 1. Those burdens were added to the statute during the 1985 session of the General Assembly and came into effect on 1 January 1986. 1985 N.C. Sess. Laws 746, secs. 1, 19 (“This act shall not affect contested cases commenced before January 1, 1986.”). As this Court has since explained, the amended provisions of section 150B-23(a) require the ALJ in a contested case hearing to “determine whether the petitioner has met its burden in showing that the agency substantially prejudiced [the] petitioner’s rights, *and* that the agency *also* acted outside its authority, acted erroneously, acted arbitrarily and capriciously, *used improper procedure*, or failed to act as required by law or rule.” *Britthaven, Inc. v. N.C. Dep’t of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (emphasis modified), *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). These burdens require that, when the petitioner alleges that the Agency did not properly apply its own rules, the petitioner *must also* prove, and the ALJ must separately decide the issue of, substantial prejudice, *i.e.*, that the Agency’s failure to follow its rules *actually* caused sufficient harm to the petitioner. See *id.*; see also *Parkway Urology*, 205 N.C. App. at 535–37, 696 S.E.2d at 192–93; N.C. Gen. Stat. § 150B-23(a). The Agency’s mere failure to follow its own rules is not enough. Accordingly, Defendant’s argument in reliance on *Eaker* is overruled.

We turn now to the next case cited by Petitioners to support their contention that the Agency’s alleged failure to follow its rules constitutes substantial prejudice as a matter of law. The petitioner in *Hospice at Greensboro* was a hospice service provider located in Greensboro. 185 N.C. App. at 3–5, 647 S.E.2d at 653–54. Following the Agency’s issuance of a “no review” letter, which authorized the respondent to open an office in Greensboro without first obtaining CON review, the petitioner sought a contested case hearing. *Id.* The respondent filed a motion for summary judgment on grounds that the petitioner “was not an ‘aggrieved party’ because the issuance of [the letter] . . . did not ‘substantially prejudice’ [the petitioner’s] rights,” and that motion was granted. *Id.* at 5–6, 647 S.E.2d at 654–55.

On appeal by the respondent, we affirmed the decision to grant the petitioner’s motion for summary judgment because the issuance of the letter, “which result[ed] in the establishment of a new institutional health service without a prior determination of need, substantially prejudice[d the petitioner,] a licensed, pre-existing competing health

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service provider[,] as a matter of law.” *Id.* at 16, 647 S.E.2d at 661. In so holding, we noted that “the CON [s]ection’s issuance of [the letter] . . . effectively prevented any existing health service provider or other prospective applicant from challenging [the] proposal [to open a new office] at the agency level, except by filing a petition for a contested case.” *Id.* at 17, 647 S.E.2d at 661–62.

In this case, unlike *Hospice at Greensboro*, the Agency conducted a full review of WakeMed’s CON application. This review included consideration “of the applications submitted for this cycle[,] . . . the [CON] law, . . . the State Medical Facilities Plan, and other applicable information.” The Agency elected to approve WakeMed’s application only after completing the CON review process. Petitioners had the opportunity to comment on the application and took advantage of that opportunity by submitting a detailed discussion of the validity of WakeMed’s CON application. In addition, Petitioners participated in a public hearing on 18 June 2012, summarizing their concerns. Thus, Petitioners were not prohibited from challenging WakeMed’s CON application at the agency level. Petitioners’ argument is overruled as it pertains to *Hospice at Greensboro*.

As for *HCA Crossroads*, the final case cited by Petitioners in support of their position, the controlling issue in that case was “whether the [relevant agency] lost subject matter jurisdiction when it failed to act, within the time prescribed by law, on applications for [CONs] for construction of chemical dependency treatment facilities.” 327 N.C. at 574, 398 S.E.2d at 467. On that issue our Supreme Court held that the agency lost its authority to deny applications for CONs by failing to act in a timely manner. *Id.* The Court did not address section 150B-23(a) or the requirement that a petitioner opposing the issuance of a CON must establish substantial prejudice. *See id.* Accordingly, Petitioners’ argument in reliance on *HCA Crossroads* is overruled.

Petitioners argue that they were substantially prejudiced as a matter of law because the Agency failed to apply the conversion rules. As discussed above, however, the petitioner must establish that the Agency has deprived it of property, has ordered it to pay a fine or penalty, or has otherwise substantially prejudiced the petitioner’s rights, *and, in addition*, the petitioner must establish that the agency’s decision was erroneous in a certain, enumerated way, such as failure to follow proper procedure or act as required by rule or law. *Parkway Urology*, 205 N.C. App. at 535–37, 696 S.E.2d at 192–93; *see also* N.C. Gen. Stat. § 150B-23(a). These are discrete requirements and proof of one does not automatically establish the other. *See Parkway Urology*, 205 N.C. App.

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at 535–37, 696 S.E.2d at 192–93; *see generally Britthaven, Inc.*, 118 N.C. App. at 382, 455 S.E.2d at 459 (treating the substantial prejudice and agency error requirements as separate elements to be addressed at the hearing). As we have already stated,

the ALJ [in a CON case must, in evaluating the evidence,] determine *whether the petitioner has met its burden in showing that [(1)] the agency substantially prejudiced [the] petitioner's rights, and . . . [(2)] acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.*

205 N.C. App. at 536, 696 S.E.2d at 193 (citing *Britthaven, Inc.*, 118 N.C. App. at 382, 455 S.E.2d at 459; certain emphasis added). Therefore, while the Agency's action under part two of this test might ultimately result in substantial prejudice to a petitioner, the taking of the action does not absolve the petitioner of its duty to separately establish the existence of prejudice, *i.e.*, to show *how* the action caused it to suffer substantial prejudice. *See id.* Accordingly, Petitioners' argument that they were substantially prejudiced solely on the basis that the Agency failed to apply the conversion rules is overruled.

(2) Substantial Prejudice by Competitive Disadvantage

Second, Petitioners argue that they were substantially prejudiced by the Agency's decision because that decision will likely make it more difficult for Petitioners to acquire additional operating rooms in the future, giving WakeMed a competitive advantage. Again, we disagree.

Medical facilities, including operating rooms, are regulated by chapter 131E of the North Carolina General Statutes ("the Act"). In section 175, the General Assembly stated "[t]hat the proliferation of unnecessary health services facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services." N.C. Gen. Stat. § 131E-175(4). As a consequence, a CON is required for the development of an additional institutional health service, including the use and implementation of an operating room. *See* N.C. Gen. Stat. § 131E-178(a); *see also Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 276, 281, 691 S.E.2d 421, 424 (2010) ("The fundamental purpose of the [CON] law is to limit the construction of health care facilities in this [S]tate to those that the public needs and that can be operated efficiently and economically for their benefit."), *disc. review denied*, __ N.C. __, 706 S.E.2d 254 (2011).

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In order for the Agency to issue a CON, the proposed project must be “consistent with applicable policies and need determinations in the State Medical Facilities Plan [(“SMFP”)]” N.C. Gen. Stat. § 131E-183. The SMFP is a document prepared by the North Carolina State Health Coordinating Council and the Agency “which constitutes a determinative limitation on the provision of any . . . operating rooms . . . that may be approved.” N.C. Gen. Stat. §§ 131E-183(a)(1), -176, -177(4). CON review is not typically required, however, if the party seeking to develop the additional health service acquires an existing health service facility. N.C. Gen. Stat. § 131E-184(a)(8).

In determining whether there is a need for additional health service facilities, the Agency considers a number of factors, including the number of operating rooms currently in use and how regularly those rooms are being used. Operating rooms that are used infrequently are considered “underutilized” and are not a part of the Agency’s calculus. At the time WakeMed filed its CON application, there was not a need for additional operating rooms in Wake County.

The operating rooms that WakeMed seeks to relocate from Southern Eye to its Raleigh Campus are currently considered “underutilized.” Therefore, they are not counted in the Agency’s formula for determining need. At the hearing, Petitioners presented testimony that the operating rooms would no longer be considered underutilized if transferred to the Raleigh Campus. As a result, those rooms would be counted in the Agency’s subsequent need determination formula. Petitioners argue that this change constitutes substantial prejudice because it means that the Agency will be less likely to find a need for more operating rooms in the near future and, thus, Petitioners will be unable to expand their health care service. We do not find merit in Petitioners’ argument.

In order to establish substantial prejudice, the petitioner must “provide specific evidence of harm resulting from the award of the CON . . . that went beyond any harm that necessarily resulted from additional . . . competition” *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 194–95 (“[The petitioner] did not, however, quantify th[e] financial harm in any specific way, other than testimony regarding the amount of revenue [it] receives”). The harm required to establish substantial prejudice cannot be conjectural or hypothetical. It must be concrete, particularized, and “actual” or imminent. *See Ridge Care, Inc. v. N.C. Dep’t of Health & Human Servs.*, 214 N.C. App. 498, 506, 716 S.E.2d 390, 396 (2011) (“[The p]etitioner[s]’ claims of potential harm should [the respondent] decide to develop facilities in the counties where petitioners are located or where they may wish to file CON applications

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are similarly unsupported. There was no evidence presented that [the respondent] is planning to develop facilities in those counties or that petitioners have suffered any *actual harm*.”) (emphasis added).

Petitioners’ argument that they were substantially prejudiced by the Agency’s decision is based on sheer speculation. They have neither alleged nor proven that the relocation of these two operating rooms has caused them any actual harm. In fact, SCA’s vice president of operations admitted during the 15 April 2013 hearing that Petitioners had not undertaken any analysis of the economic impact of the Agency’s decision upon them prior to filing their petition. According to the vice president, Petitioners have instead

look[ed] at the fact that we need additional operating rooms based on surgeons and specialties that we’re trying to move in and the space that we need to do those. And to me the harm comes from the surplus and this adding to the surplus and potentially just making it longer before we’re ever able to expand.

As the vice president made clear in her testimony, the only purported harm to Petitioners is the possibility that the Agency’s decision will make it more difficult for them to expand their business. This concern is based on their understanding of how the need-determination process works. It is not clear, however, that the outcome suggested by Petitioners will occur. When the vice president was asked whether SCA would “definitely decide to apply” for more operating rooms when a need determination is eventually made, she admitted that she could not be sure because “who knows when that will be and who knows what the situation will be then[.]”

At the moment, the operating rooms are still a part of Southern Eye. They have not been transferred to WakeMed’s Raleigh Campus, and an SMFP taking those rooms into account has not been issued. Even if this occurs, however, Petitioners have not presented any evidence that the transfer of these rooms would result in substantial prejudice. Although Petitioners allege that they would like to expand their business, they have not and cannot assert that they will necessarily do so when or if the Agency finds a need. Indeed, it is entirely plausible that a health care provider other than Petitioners would obtain any new operating rooms found to be needed in the future. For these reasons, Petitioners’ argument that the relocation of the operating rooms will likely result in substantial prejudice by competitive disadvantage is overruled.

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Petitioners have failed to show that the Agency's decision to grant WakeMed's application resulted in substantial prejudice. Because a showing of substantial prejudice is a necessary element of Petitioners' attempt to successfully oppose the Agency's decision, we need not address Petitioners' argument that the Agency should have applied the conversion rules. We affirm the ALJ's final decision.

AFFIRMED.

Judges HUNTER, JR., ROBERT N., and ERVIN concur.

WAKE COUNTY, PLAINTIFF
v.
HOTELS.COM, L.P., ET AL., DEFENDANTS

BUNCOMBE COUNTY, PLAINTIFF
v.
HOTELS.COM, L.P., ET AL., DEFENDANTS

DARE COUNTY, PLAINTIFF
v.
HOTELS.COM, L.P., ET AL., DEFENDANTS

MECKLENBURG COUNTY, PLAINTIFF
v.
HOTELS.COM, L.P., ET AL., DEFENDANTS

No. COA13-594

Filed 19 August 2014

1. Taxation—occupancy tax—gross receipts from rentals—online travel companies not operators of hotels

The trial court did not err by determining that defendant online travel companies had no liability under the respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties for failure to collect and remit an occupancy tax on the sale price defendants imposed on consumers. Defendants were not operators of hotels, motels, tourist homes, or tourist camps within the meaning of N.C.G.S. § 105-164.4(a)(3). Thus, the gross receipts defendants derived from the rentals were not subject to plaintiff counties' room occupancy tax.

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2. Appeal and Error—preservation of issues—insufficient notice—failure to argue

The trial court did not err by dismissing plaintiff counties' claim that defendant online travel companies were contractually obligated to collect and remit an occupancy tax. There was insufficient notice of a contractual obligation claim. Further, plaintiffs raised this claim for the first time in a motion for summary judgment and on appeal.

3. Taxation—failure to remit—failure to show legal duty

The trial court did not err by dismissing plaintiff counties' claim that defendants collected but failed to remit taxes charged on the sales price paid by consumers. Plaintiffs failed to provide any authority that defendants had a legal duty to collect taxes.

4. Accountants and Accounting—occupancy tax—no legal obligation to remit

The trial court did not err by dismissing plaintiff counties' claim for accounting. As plaintiffs could not establish that defendants were under a legal obligation based on their individual occupancy tax resolutions to collect and remit taxes to the respective county, plaintiffs could not prevail on their demands for accounting.

5. Conversion—taxes—not a specific amount—category

The trial court did not err by dismissing plaintiff Mecklenburg County's claim for conversion. The claim was not one for a specific amount of taxes alleged due, much less particular bills and coins, but instead was for a category of monies allegedly owed which was taxes.

6. Trusts—constructive trust—summary judgment

The trial court did not err by dismissing plaintiff counties' claim for a constructive trust. Plaintiffs were unable to establish any genuine issue of material fact as to whether defendants had retained monies collected from the rental of accommodations in the respective counties which were acquired through fraud, breach of duty or some other circumstance making it inequitable for defendants to retain it.

Appeal by plaintiffs from Order and Opinion filed on 19 December 2012 by Judge Calvin E. Murphy in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 19 November 2013.

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[235 N.C. App. 633 (2014)]

Ward and Smith, P.A., by Gary J. Rickner and Joseph A. Schouten; and Law Office of Michael Y. Saunders, by Michael Y. Saunders, for plaintiff-appellants.

Williams Mullen, by Charles B. Neely, Jr., Christopher G. Browning, Jr., Nancy S. Rendleman, Robert W. Shaw; Kelly Hart & Hallman, LLP, by Brian S. Stagner, pro hac vice, and Marcus G. Mungioni, pro hac vice; Skadden, Arps, Slate, Meagher & Flom LLP, by Darrel J. Hieber, pro hac vice, and Randolph K. Herndon, pro hac vice, for defendant-appellees.

BRYANT, Judge.

Where the trial court did not err in concluding that defendants are not subject to plaintiffs' occupancy tax and where the trial court did not err in concluding that defendants were not required to collect and remit an occupancy tax, we affirm the trial court's grant of summary judgment in favor of defendants. Where the trial court dismissed plaintiffs' claim seeking recovery for collected but not remitted taxes on the basis of a contractual obligation because of plaintiffs' failure to provide sufficient notice of the claim in their pleadings, we affirm the dismissal. Lastly, where the trial court granted summary judgment in favor of defendants on plaintiffs' claims for an accounting, conversion, and seeking to impose a constructive trust, we affirm.

Defendants are approximately eleven online travel companies (OTC) that operate websites which allow consumers to select and pay for hotel rooms directly online using a credit card. Consumers can make reservations with airlines, car rental companies, and cruise lines in addition to hotels. Defendants negotiate and contract with hotels to obtain rooms at discount rates, these rooms are then sold to customers at a rate the hotel is obligated to honor. Consumers who take advantage of this offer never pay the hotel directly, only the OTC.

Plaintiffs are four counties—Wake, Dare, Buncombe, and Mecklenburg—who are required by North Carolina statutes and local ordinances to collect and remit an occupancy tax based on a percentage of the receipts derived from the rental of hotel rooms in their respective counties. Plaintiffs claim that defendants charge consumers a rate higher than the discount rate negotiated with the hotel yet only remit to plaintiffs a tax amount based on the reduced rate. Plaintiffs contend defendants are liable for substantial unremitted tax amounts.

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Procedural History

We discuss the procedural history for the lawsuits initially brought by each county.

Wake County

In Wake County Superior Court on 2 November 2006, Wake County filed a verified complaint and action for declaratory judgment against defendants Hotels.com, LP; Hotwire, Inc.; Trip Network, Inc. (d/b/a Cheap Tickets.com); Expedia, Inc.; Internetwork Publishing Corp. (D/B/A Lodging.com); Lowestfare.com, Inc.; Maupin-Tour Holding, LLC¹; Travelport, Inc. (f/k/a Cendant Travel Distribution Services Group, Inc.)²; Orbitz, LLC; Priceline.com, Inc.; Site59.com, LLC; Travelocity.com, LP; Travelweb LLC; and Travelnow.com, Inc.³ Wake County asserted that the action was to collect occupancy taxes and penalties due Wake County from gross receipts defendants derived from the rental of rooms, lodging, and other accommodations furnished by hotels, motels, and similar places located in Wake County. By county ordinance, Wake County imposed a six percent “room occupancy tax” on the gross proceeds derived from the rental of hotel rooms and other accommodations within the county.⁴ Wake County sought a declaratory judgment and injunction declaring that defendants’ actions subjected defendants to payment of the occupancy tax. Wake asserted the following: violation of the room occupancy tax ordinance; conversion; imposition of a constructive trust; a demand for accounting; unfair and deceptive trade practices; agency; and claim for statutory penalties pursuant to Wake County ordinances. Wake County alleged damages in excess of \$1,000,000.00 annually.

1. On 6 November 2007, Wake County filed notice of voluntary dismissal without prejudice of its claims against defendant Maupin-Tour Holding, LLC.

2. On 25 January 2008, Wake County filed notice of voluntary dismissal without prejudice of its claims against defendant Travelport, Inc. (f/k/a Cendant Travel Distribution Services Group, Inc.).

3. On 11 December 2011, Wake County filed notice of voluntary dismissal without prejudice of its claims against Travelnow.com, Inc.

4. “The County of Wake hereby imposes and levies a tax of six percent (6%) of the gross receipts derived by any person, firm, corporation, or association from the rental of any room, lodging or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the County that is subject to the State sales tax imposed under Section 105-164.4(a)(3) of the North Carolina General Statutes.” WAKE COUNTY, N.C., R-91-107 § 1 (1991).

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Dare County

In Dare County Superior Court, on 26 January 2007, Dare County filed a verified complaint and action for Declaratory Judgment against the identical entities named in the Wake County complaint.^{5,6,7} Dare County, like Wake County, asserted that the action was to collect occupancy taxes and penalties due Dare County from gross receipts defendants derived from the rental of rooms, lodging, and other accommodations furnished by hotels, motels, and similar places located in Dare County. Dare County imposed a five percent “room occupancy tax” on the gross proceeds from the rental of hotel rooms and other accommodations within the county.⁸ Like Wake County, Dare County sought a declaratory judgment and injunction declaring that defendants’ actions subjected defendants to payment of the occupancy tax. Dare asserted the following: violation of the room occupancy tax ordinance; conversion; imposition of a constructive trust; a demand for accounting; unfair and deceptive trade practices; agency; and claim for statutory penalties pursuant to enabling legislation for the Dare County ordinance enacted by the North Carolina General Assembly. Dare County alleged damages in excess of \$1,000,000.00 annually.

5. On 20 August 2007, Dare County filed notice of voluntary dismissal without prejudice of its claims against Maupin-Tour Holding, LLC.

6. On 7 December 2007, Dare County filed notice of dismissal without prejudice of its claims against Travelnow.com, Inc.

7. On 1 February 2008, Dare County filed notice of voluntary dismissal without prejudice of its claims against Travelport, Inc. (f/k/a Cendant travel Distribution Services Group, Inc.).

8. “There is hereby levied in the County of Dare a room occupancy tax of three per cent [sic] (3%) on the gross receipts derived from the rental of any room, lodging, or similar accommodation subject to sales tax under G.S. 105-164.4(a)(3).” DARE COUNTY, N.C., Resolution 91-9-26 § 1 (1992).

“There is hereby levied within Dare County a room occupancy and tourism development tax of one per cent [sic] (1%) of the gross receipts derived from the rental of any room, lodging, or similar accommodation subject to sales tax under G.S. 105-164.4(a)(3) . . .” DARE COUNTY, N.C., Resolution 91-9-27 § 1 (1992).

“Whereas, the General Assembly of North Carolina . . . has authorized the Dare County Board of Commissioners to levy a supplemental room occupancy tax of 1% of the gross receipts derived from the rental of any room, lodging, or similar accommodations subject to sales tax under G.S. 105-164.4(a)(3) . . . located in Dare County . . . the Dare County Board of Commissioners desires to levy the said 1% supplemental occupancy tax . . .” DARE COUNTY, N.C., Resolution implementing supplemental occupancy tax (Dec. 3, 2001).

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Buncombe County

In Buncombe County Superior Court on 1 February 2007, Buncombe County filed a declaratory judgment action against Hotels.com⁹; Hotels.com, LP¹⁰; Hotels.com GP, LLC; Hotwire, Inc.; Trip Network, Inc., d/b/a Cheaptickets.com; Travelport, Inc., (f/k/a Cendant Travel Distribution Services Group, Inc.)¹¹; Expedia, Inc.; Internetwork Publishing Corp., d/b/a Lodging.com; Lowestfare.com, Inc.; Orbitz, Inc.; Orbitz, LLC; Priceline.com, Inc.; Priceline.com LLC; Sites59.com, LLC; Travelweb, Inc.; Travelnow.com, Inc.; Cheap Tickets, Inc.; and Sabre, Inc. Buncombe County sought “a declaratory judgment concerning its power, privilege, and right to audit and collect from [] defendants the North Carolina Occupancy Tax, N.C.G.S. 153A-155” Buncombe County alleged that its ordinances imposed a room occupancy and tourism development tax on the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by any hotel, motel, inn, tourist camp, or other similar place within the county.¹² On the date the declaratory judgment action was filed, the room occupancy tax was four percent.

Mecklenburg County

In Mecklenburg County Superior Court on 14 January 2008, Mecklenburg County filed a verified complaint and action for declaratory judgment against the same entities named in the Wake County complaint with the exception of Maupin-Taylor Holding, LLC, and Travelnow.com, LLC.¹³

9. On 4 April 2007 Buncombe County filed notice of dismissal without prejudice of its claims against Hotels.com; Orbitz, Inc.; Priceline.com, LLC; Site59.com, LLC; Travelocity.com, Inc.; Travelnow.com, Inc.; Cheap Tickets, Inc.; Sabre, Inc.; and Travelweb, Inc.

10. On 10 December of 2007, Buncombe County filed notice of dismissal without prejudice its claims against Hotels.com GP, LLC.

11. On 12 February 2008 Buncombe County filed notice of dismissal without prejudice of its claims against Travelport, Inc. (f/k/a Cendant Travel Distribution Services Group, Inc.).

12. In its declaratory judgment action, Buncombe County asserts that on 23 August 1983 by Resolution #17680, the Buncombe County Board of Commissioners “enacted a two percent (2%) room occupancy and tourism development tax on the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by any hotel, motel, inn, tourist camp, or other similar place within the County”; on 26 August 1986, “the Commissioners by Resolution #18510 enacted and adopted an additional one percent (1%) occupancy tax”; and on 19 June 2001, the “Commissioners enacted an additional one percent (1%) room occupancy tax”

13. On 4 February 2008, Mecklenburg County filed notice of voluntary dismissal without prejudice of its claim against Travelport Americas, LLC (f/k/a Cendant Travel Distribution Group, Inc.).

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Mecklenburg County asserted that the action was to declare the rights of the parties concerning taxes and penalties due to Mecklenburg County from receipts realized by defendants derived from the rental of rooms, lodging and other accommodations furnished by hotels, motels, and similar places located in Mecklenburg County. Mecklenburg County alleged that at the time the complaint was filed, it imposed an eight percent “room occupancy tax” and defendants failure to remit the tax owed deprived Mecklenburg County of more than \$1,000,000.00 annually.¹⁴ In addition to its request for an injunction, Mecklenburg County asserted the following claims: violation of occupancy tax ordinances; conversion; imposition of constructive trust; demand for accounting; unfair and deceptive trade practices; agency; and a claim for statutory penalties pursuant to both the Mecklenburg County tax ordinance and North Carolina General Statutes.

All defendants filed motions to have their respective actions designated as complex business cases. Thereafter, Chief Justice Sarah Parker issued orders designating each action as a complex business case.

On 4 April 2007, Special Superior Court Judge Albert Diaz of the North Carolina Business Court was appointed to preside over the designated complex business cases and granted defendants’ motions to consolidate the actions filed in Buncombe County, Dare County, and Wake County for pretrial matters. Thereafter, Mecklenburg County’s complaint was consolidated and joined with the other actions.

On 1 November 2010, all parties filed motions for summary judgment under seal; plaintiffs filed a consolidated motion as did defendants.

14. “Mecklenburg County hereby levies a room occupancy tax of six percent (6%) of the receipts, net of any taxes or discounts, derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within Mecklenburg County that is subject to sale tax imposed by the State of North Carolina under Section 105-164.4(a)(3) of the North Carolina General Statutes.” MECKLENBURG COUNTY, N.C., Amended and Restated Mecklenburg County Ordinance to impose and levy a room occupancy tax and a prepared food and beverage tax (Sept. 1, 1990).

“Mecklenburg County hereby levies a room occupancy tax of two percent (2%) of receipts, net of any taxes or discounts, derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within Mecklenburg County that is subject to sales tax imposed by the State of North Carolina under Section 105-164.4(a)(3) of the North Carolina General Statutes. This room occupancy tax is . . . in addition to the six percent (6%) Room Occupancy Tax previously levied by the Mecklenburg County Board of Commissioners which is in effect and remains in full force and effect.” MECKLENBURG COUNTY, N.C., Mecklenburg ordinance to impose and levy a two percent room occupancy tax (Hall of Fame Complex Tax) (March 21, 2006).

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On 4 February 2011, a summary judgment hearing was held before the Honorable Calvin E. Murphy, Special Superior Court Judge presiding in the North Carolina Business Court. After considering the parties' motions and briefs, including supporting authority and arguments of counsel, the trial court granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. Plaintiffs appeal.

On appeal, plaintiffs raise the following questions: (I) whether the trial court erred in concluding that defendants have no liability under the ordinances; (II) concluding that defendants are not contractually obligated to collect and remit the occupancy tax; (III) concluding that there was no legal support for plaintiffs' collected but not remitted claim; and (IV) dismissing plaintiffs' claims for accounting, conversion, and constructive trust.

Standard of Review

"We review a trial court's order granting summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmoving party. We are to determine whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 644-45, 692 S.E.2d 470, 472 (2010) (citation and quotations omitted).

I

[1] Plaintiffs first argue that the trial court erred in determining defendants have no liability under the respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties for failure to collect and remit an occupancy tax on the sale price defendants impose on consumers. We disagree.

The respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties impose a tax on the gross receipts derived from the rental of any room, lodging or accommodation furnished by a hotel, motel, inn, tourist camp, or "similar place" that is subject to the State sales tax imposed under General Statutes, section 105-164.4(a)(3).

In its 19 December 2012 order, the trial court reasoned that "[t]o determine whether the Defendants are obligated to pay the Occupancy Tax under the counties' ordinances or resolutions, the Court must decide 'what' and 'who' is taxed." The court reasoned that as to the "who" is taxed, Mecklenburg and Wake counties impose the responsibility of

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collection upon the “operator of a taxable establishment.” Dare and Buncombe counties impose the responsibility of tax collection upon the “operator of a business subject to a room occupancy tax.” The court concluded that defendants “can not [sic] be classified as operators of ‘taxable establishments’ or ‘businesses subject to a room occupancy tax’ under any of Plaintiff’s Occupancy Tax ordinances or resolutions, and are thus, not subject to the counties’ Occupancy Taxes.”

Plaintiffs contend the trial court violated the principle of statutory construction that all parts of a statute must be given effect and thereby rendered critical sections of the ordinances meaningless. Specifically, plaintiffs contend that as to “who” is taxed, the ordinances and enabling legislation make clear that the tax is levied against the occupant of the room. As to “what” is taxed, the ordinances establish that the levy is applied to the gross receipts derived from the rental of the accommodation.

When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself:

When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

State v. Ward, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)).

“A county may impose taxes only as specifically authorized by act of the General Assembly.” N.C. Gen. Stat. § 153A-146 (2005). Our General Assembly has authorized Buncombe, Dare, Mecklenburg, and Wake counties to impose room occupancy taxes pursuant to appropriate county ordinances and resolutions. *See* 1991 N.C. Sess. Laws ch. 594 (Wake); 1985 N.C. Sess. Laws ch. 449 (Dare); and 1983 N.C. Sess. Laws ch. 908, parts IV and VI (Mecklenburg and Buncombe). The General Assembly limited the applicability of the occupancy tax to gross receipts derived from rental transactions also subject to our State sales tax. *See* 2001 N.C. Sess. Laws ch. § 7.1 (“The Dare County Board of Commissioners may levy a room occupancy tax . . . [on] the gross receipts derived from the rental of the following in Dare County: (1) Any room, lodging, or

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similar accommodation subject to sales tax under G.S. 105-164.4(a)(3)[.]” (revisions omitted)); 2001 N.C. Sess. Laws ch. 162, § 1 (“The Board of Commissioners of Buncombe County may levy a room occupancy and tourism development tax . . . [on] the gross receipts derived from the rental of accommodations within the county that are subject to sales tax imposed by the State under G.S. 105-164.4(a)(3).” (emphasis and revisions omitted)); 1989 N.C. Sess. Laws ch. 821, § 1 (“Mecklenburg County may, by resolution of its Board of Commissioners, levy a room occupancy tax . . . [on] the gross receipts derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the county that is subject to sales tax imposed by the State under G.S. 105-164.4(a)(3).”); and 1991 N.C. Sess. Laws ch. 594, § 4 (“The Wake County Board of Commissioners may, by resolution, levy a room occupancy tax . . . [on] the gross receipts derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the county that is subject to the State sales tax imposed under G.S. 105-164.4(a)(3).”). To determine whether the gross receipts derived from the rentals in which defendants engage are subject to the occupancy tax, we must consider whether the gross receipts are subject to the State sales tax in accordance with our General Statutes, section 105-164.4(a)(3).

Section 105-164.4 (“Tax imposed on retailers”) of the North Carolina General Statutes, in pertinent part, states the following:

(a) . . . A privilege tax is imposed on a retailer . . . [on] the retailer’s net taxable sales or gross receipts, as appropriate.

. . .

(3) Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses . . . are considered retailers under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from the rental of any rooms, lodgings, or accommodations furnished to transients for a consideration.

N.C. Gen. Stat. § 105-164.4(a)(3) (2005) (effective for sales made on or after July 1, 2007).

Whether the gross receipts derived from the rentals in which defendants engage are subject to the occupancy tax hinges on whether defendants are “retailers” within the meaning of section 105-164.4(a)(3). *See id.* (“A privilege tax is imposed on . . . the retailer’s net taxable sales

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or gross receipts . . . Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses . . . are considered retailers under this Article.”).

The trial court found that plaintiffs did not contend defendants were operators of hotels, motels, tourist homes, or tourist camps. Therefore, the court considered only whether defendants were operators of “similar type businesses.”

In addressing this issue, we note with favor the reasoning of the Fourth Circuit Court of Appeals in *Pitt Cnty. v. Hotels.com, GP, LLC*, 553 F.3d 308 (4th Cir. 2009), considering “whether the phrase ‘operators of hotels, motels, tourist homes, tourist camps, and similar type businesses’ in § 105–164.4(a)(3) in the North Carolina sales tax statute applies to online travel companies.” *Id.* at 313. In considering whether OTC and hotels operated “similar type businesses,” the Court found applicable the principle of *ejusdem generis*, the canon of statutory construction standing for the proposition that “where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.” *Id.* (citing *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682, 686–87 (1985)); see also *State ex rel. Utilities Comm’n v. Envtl. Def. Fund*, 214 N.C. App. 364, 368, 716 S.E.2d 370, 373 (2011) (“North Carolina courts have followed this explanation of how the doctrine of *ejusdem generis* should be applied by employing the doctrine when a list of specific terms is followed by a general term. See *Liborio v. King*, 150 N.C. App. 531, 536–37, 564 S.E.2d 272, 276 (2002) (interpreting the term “misrepresentation” to be limited to knowing and intentional behavior, where the term followed the words fraud and deception); [*Smith*, 314 N.C. at 87, 331 S.E.2d at 687] (interpreting a provision allowing the court to consider “any other factor which the court finds to be just and proper” to be limited to economic factors, where the provision followed eleven other provisions having to do with the economy of the marriage); [*State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970)] (interpreting the phrase “or other like weapons” to be limited to automatic or semiautomatic weapons, where the phrase followed a specific list of automatic and semiautomatic weapons.”)).

In section 105-164.4(a)(3), the phrase “similar type businesses” follows the list: “hotels, motels, tourist homes, [and] tourist camps[.]” N.C.G.S. § 105-164.4(a)(3). A “hotel” is defined as “[a]n establishment

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that provides lodging and usu [sic]. Meals and other services for travelers and other paying guests.” AMERICAN HERITAGE COLLEGE DICTIONARY 658 (3d ed. 1993). A motel is “[a]n establishment that provides lodging for motorists in rooms usu. having direct access to a parking area.” *Id.* at 890. A “tourist home” is “a house in which rooms are available for rent to transients.” Tourist home definition, merriam-webster.com, <http://www.merriam-webster.com/dictionary/tourist%20home> (last visited August 11, 2014). We were unable to find a definition for “tourist camp,”; however, we note that “tourist” is defined as “[o]ne who travels for pleasure,” and “camp” is defined as “[a] place where tents, huts, or other temporary shelters are set up [, or] [a] place in the country that offers simple group accommodations and organized recreation or instruction.” AMERICAN HERITAGE COLLEGE DICTIONARY 202, 1431. A common characteristic of such establishments is that they are physical structures with rooms or at least physical locations. Per section 105-164.4(a)(3), the “operator” of such an establishment is a “retailer.” “Operator” is defined as “[t]he owner or manager of a business or industrial enterprise.” AMERICAN HERITAGE COLLEGE DICTIONARY 957.

Plaintiffs do not contend that defendants are owners or managers of the establishments providing accommodations; rather, plaintiffs argue that this Court should interpret the word “business” broadly. However, such an analysis would ignore the requirements of section 105-164.4(a)(3), that defendants be operators of “*similar type* businesses.” We hold that defendants are not operators of hotels, motels, tourist homes, or tourist camps within the meaning of section 105-164.4(a)(3). This holding is consistent with the reasoning of the trial court and the *Pitt* Court. *See Pitt Cnty.*, 553 F.3d at 313 (hotels, motels, tourist homes, and tourist camps – “all provide physical establishments . . . where guests can stay. A business that arranges for the rental of hotel rooms over the internet, but that does not physically provide the rooms, is not a business that is of a similar type to a hotel, motel, or tourist home or camp.”). Defendants are neither operators nor retailers within the meaning of section 105-164.4(a)(3). *See* N.C.G.S. § 105-164.4(a)(3) (“A privilege tax is imposed on . . . the retailer’s net taxable sales or gross receipts Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses . . . are considered retailers under this Article.”); *see also Pitt Cnty.*, 553 F.3d at 314 (holding that an online travel company is not a retailer within the plain meaning of General Statutes, section 105-164.4(a)(3)).

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Applying our holding that defendants are not “retailers” within the meaning of General Statutes, section 105-164.4(a)(3)¹⁵, we must also conclude that defendants’ gross receipts are not subject to the State sales tax under section 105-164.4(a)(3) (“A tax . . . is levied on the gross receipts derived by these retailers . . .”). Thus, the gross receipts defendants derive from the rentals are not subject to plaintiffs’ room occupancy tax. *See* 2001 N.C. Sess. Laws ch. 439 § 7.1; 2001 N.C. Sess. Laws ch. 162 § 1; 1991 N.C. Sess. Laws ch. 594, § 4; and 1989 N.C. Sess. Laws ch. 821, § 1. Because the trial court did not err in determining that defendants have no liability under the respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties for failure to collect and remit an occupancy tax on the sale price defendants impose on consumers, plaintiffs’ argument is overruled.

II

[2] Plaintiffs next argue that the trial court erred in determining that defendants are not contractually obligated to collect and remit the occupancy tax. We disagree.

15. We note that pursuant to 2009 N.C. Sess. Laws 2010-31, § 31.6(a) (effective July 1, 2010), N.C. Gen. Stat. § 105-164.4(a)(3) was re-written. As re-written, section 105-164.4(a)(3) includes the following language:

Gross receipts derived from the rental of an accommodation include the sales price of the rental of the accommodation. . . . The sales price of the rental of an accommodation marketed by a facilitator includes charges designated as facilitation fees and any other charges necessary to complete the rental.

A person who provides an accommodation that is offered for rent is considered a retailer under this Article. A facilitator must report to the retailer with whom it has a contract the sales price a consumer pays to the facilitator for an accommodation rental marketed by the facilitator. A retailer must notify a facilitator when an accommodation rental marketed by the facilitator is completed and, within three business days of receiving the notice, the facilitator must send the retailer the portion of the sales price the facilitator owes the retailer and the tax due on the sales price.

...

The following definitions apply in this subdivision:

...

b. Facilitator. – A person who is not a rental agent and who contracts with a provider of an accommodation to market the accommodation and to accept payment from the consumer for the accommodation.

2009 N.C. Sess. Laws ch. 2010-31, §31.6(a).

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In its order, the trial court concluded that as to a recovery based on a theory of contractual undertaking, “Plaintiffs failed to provide sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it.” The court went on to reason that even if it were to consider plaintiffs’ claim for recovery under a theory of contractual undertaking, “it would [] have to acknowledge that there is no legal support for such a theory in North Carolina’s case law.” For these reasons, the trial court granted defendants’ motion to dismiss the claim.

“The grant of a motion to dismiss is reviewed *de novo* on appeal.” *Hayes v. Peters*, 184 N.C. App. 285, 287, 645 S.E.2d 846, 847 (2007) (citation omitted).

Pursuant to General Statutes, section 1A-1, Rule 8,

[a] pleading which sets forth a claim for relief . . . shall contain

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief and

(2) A demand for judgment for the relief to which he deems himself entitled.

N.C. Gen. Stat. § 1A-1, Rule 8(a) (2013). By enacting section 1A-1, Rule 8(a), our General Assembly adopted the concept of notice pleading. See *Sutton v. Duke*, 277 N.C. 94, 100, 176 S.E.2d 161, 164 (1970). Under notice pleading, “a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought.” *Id.* at 102, 176 S.E.2d at 165 (citation omitted). “Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” *Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988) (citation omitted). “Despite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim” *Hayes v. Peters*, 184 N.C. App. 285, 287, 645 S.E.2d 846, 847 (2007) (citation and quotations omitted).

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Plaintiffs contend defendants had sufficient notice of plaintiffs' contractual obligation theory from the complaints and plaintiffs' summary judgment trial briefs.

In their brief to this Court, plaintiffs combine and point to five allegations scattered throughout the complaint filed by Mecklenburg County and argue the allegations are sufficient to provide defendants with notice of plaintiffs' contractual obligation theory.

Mecklenburg County's Complaint alleges that: (1) Defendants contract with local hotels for rooms at negotiated discounted rates and "charge and collect the Tax from occupants at the time of the sale based on the marked up room rates"; (2) Defendants were "authorized to act on behalf of the hotels"; (3) Defendants, as "agents" for the hotels, "were required to collect the Tax from the consumers of the rooms"; (4) Defendants, as agents for the hotels, have collected the Tax but failed to pay the full amount due to Plaintiffs; and (5) Plaintiffs are entitled to a declaratory judgment that Defendants are agents for taxable establishments and "as such, are required to collect the County's full tax from the consumers of the rooms."

The referenced allegations were found in separate sections of the complaint including: in assertions of underlying fact; in a request for a declaratory judgment; in a claim for recovery based on a theory of agency; and in plaintiff Mecklenburg County's prayer for relief. However, even reading these statements together, we cannot interpret them as providing notice of a cognizable claim. Plaintiffs attempt to seek recovery for breach of contract based on a contractual obligation to collect the occupancy tax on the gross receipts defendants derived from the rental of accommodations. On this record, we cannot find that plaintiffs' contract theory has been sufficiently pled and therefore, find no error in the trial court's ruling granting defendants' motion to dismiss this claim. Though not specifically argued, plaintiffs reference statements in the complaints of Wake County, Buncombe County, and Dare County. A review of these complaints reveals a repetition of some portions of the allegations made in the Mecklenburg County complaint, but they are likewise insufficient to provide notice of a cognizable claim. Thus, we find insufficient notice of a contractual obligation claim as to the complaints of Buncombe, Dare, and Wake Counties.

Plaintiffs further contend that a claim raised during summary judgment may provide sufficient notice to the opposing party where the

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party asserting the claim did not earlier disavow it. In support of their contention, plaintiffs cite cases from the Sixth Circuit Federal Court interpreting Federal Rules of Civil Procedure:

Where language in a complaint is ambiguous, the Sixth Circuit employs a “course of the proceedings test” to determine whether defendants have received notice of the plaintiff’s claims, analyzing the adequacy of notice on a case-by-case basis. *Accord Moore v. City of Harriman*, 272 F.3d 769, 772, 774 (6th Cir.2001) (en banc) (plurality opinion) (“Subsequent filings in a case may rectify deficiencies in the initial pleadings.” (citations omitted)). A plaintiff may sufficiently notify a defendant of an argument by raising it in a response to summary judgment, provided that the party does not disavow its intent to use the argument earlier in the proceedings.

Copeland v. Regent Elec., Inc., 499 F. App’x 425, 435 (6th Cir. 2012) (unpublished) (citations and quotations omitted).

Interpreting our Rules of Civil Procedure as to notice pleading, our Supreme Court has held that “notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” *Pyco Supply Co., Inc.*, 321 N.C. at 442-43, 364 S.E.2d at 384. Plaintiffs raised a claim for the first time in a motion for summary judgment and on appeal, provide no authority from our General Statutes or North Carolina jurisprudence to support their argument to do so. We affirm the trial court’s dismissal of plaintiff’s claim that defendants are contractually obligated to collect and remit the occupancy tax.

III

[3] Plaintiffs argue the trial court erred by dismissing their claim that defendants collected but failed to remit taxes charged on the sales price paid by consumers. Specifically, plaintiffs contend Judge Murphy impermissibly overruled the prior holding of another superior court judge, Judge Diaz. We disagree.

“Litigants and superior court judges must remain mindful that the power of one judge of the superior court is equal to and coordinate with that of another.” *Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 651, 692 S.E.2d 470, 476 (2010) (citation and quotations omitted).

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The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

Calloway v. Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citation omitted).

Here, Judge Diaz was presented with a challenge to plaintiffs' claim for collected but not remitted taxes in the form of defendants' Rule 12(b)(6) motion to dismiss. When the motion was denied, defendants subsequently challenged the same claim in the form of a motion for summary judgment before Judge Murphy.

The test [for a] Rule 12(b)(6) [motion] is whether the pleading is legally sufficient. The test on a motion for summary judgment made under Rule 56 and supported by matters outside the pleadings is whether on the basis of the materials presented to the courts there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. Therefore, the denial of a motion to dismiss made under Rule 12(b)(6) does not prevent the court, whether in the person of the same or a different superior court judge, from thereafter allowing a subsequent motion for summary judgment made and supported as provided in Rule 56.

Barbour v. Little, 37 N.C. App. 686, 692, 247 S.E.2d 252, 256 (1978). "[T]he Rule 12(b)(6) motion is addressed solely to the sufficiency of the complaint" *Indus., Inc. v. Constr. Co.*, 42 N.C. App. 259, 263, 257 S.E.2d 50, 53 (1979) (citation omitted).

In his 19 November 2007 order addressing defendants' motion to dismiss plaintiffs' claim for failure to remit taxes, Judge Diaz gave the following summary as to plaintiffs' allegations:

(71) The Complaints in these cases allege (either directly or by implication) that Defendants are in fact charging and collecting the Occupancy Tax from consumers, but not remitting to Plaintiffs the full amount collected. In fact, Plaintiffs allege Defendants are charging and collecting the tax on the higher retail rate charged to consumers, but only remitting to Plaintiffs an amount

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of tax based on the lower wholesale rate paid to hotel owners, thereby pocketing the difference. Plaintiffs also allege Defendants are not filing occupancy returns, as required by law. . . .

Based on these allegations, Judge Diaz concluded that “Defendants have not complied with the plain language of the Occupancy Tax (and the corresponding enabling acts) requiring them to account for and remit all such taxes.” Thus, “[a]t this stage . . . the Court need only look to Plaintiffs’ pleadings to conclude that dismissal of the principal claims is not appropriate.” Judge Diaz, therefore, denied defendants’ motion to dismiss pursuant to Rule 12(b)(6).

On 4 February 2011, Judge Murphy heard arguments from plaintiffs and defendants on cross motions for summary judgment. Based on their briefs and arguments before the trial court, Judge Murphy granted summary judgment in favor of defendants, dismissing plaintiffs’ claim for collected but not remitted taxes.

In his order, Judge Murphy discussed three cases presented by plaintiffs in support of their motion: “*City of Rome v. Hotels.com*, No.4:05-CV-249-HLM, 2006 U.S. Dist. LEXIS 56369 (N.C. May 8, 2006)”; “*Expedia, Inc. v. City of Columbus*, 681 S.E.2d 122 (Ga. Sup. Ct. 2009)”; and “*City of Gallup v. Hotels.com, L.P.*, No.06-0549-JC, 2007 U.S. Dist. LEXIS 86720 (January 30, 2007).” Each case dealt with similar questions of tax liability and OTCs in other jurisdictions. Judge Murphy observed that where an OTC had been held responsible for remitting a tax, the conclusion was predicated upon a statutory requirement or contractual provision imposing upon the OTC the responsibility for collecting the tax. By comparison, Judge Murphy noted that our North Carolina General Statutes did not impose the same duty upon defendants, and plaintiffs provided no authority supporting a recovery predicated on a theory of contractual undertaking. Accordingly, Judge Murphy concluded that “Plaintiffs’ [sic] have been unable to direct this Court to any binding legal precedent to support a ‘collected-but-not-remitted’ theory of recovery” and on this basis, granted defendants’ motion to dismiss the claim.

Judge Diaz and Judge Murphy addressed motions in this case at different stages in the action and based on different rules. Judge Diaz concluded pursuant to Rule 12(b)(6) that the factual allegations in plaintiffs’ complaints were legally sufficient so as to not preclude their claims for recovery of taxes. See *Barbour*, 37 N.C. App. at 692, 247 S.E.2d at 256 (“The test [for a] Rule 12(b)(6) [motion] is whether the pleading is legally sufficient.”). Thereafter, Judge Murphy concluded pursuant to

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Rule 56 that as to the issue of whether defendants were subject to the Occupancy Tax, plaintiffs failed to provide any authority that defendants had a legal duty to collect taxes. *See* N.C. Gen. Stat. § 1-1A, Rule 56(c) (2013) (Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.”). Based on our jurisprudence, Judge Murphy’s ruling pursuant to Rule 56 was proper. Therefore, plaintiffs’ argument is overruled.

IV

Lastly, plaintiffs argue that the trial court erred in dismissing their claims for accounting, conversion, and constructive trust. We disagree.

Again, “[w]e review a trial court’s order granting summary judgment *de novo*” *Stanly Cnty. Bd. of Educ.*, 203 N.C. App. at 644, 692 S.E.2d at 472 (citation omitted).

Accounting

[4] In the complaints filed by Dare County, Mecklenburg County, and Wake County, each county’s demand for an accounting was predicated upon the assertion that defendants were under a legal obligation based on their respective Occupancy Tax resolution or ordinance to collect and remit taxes to the County on the gross receipts derived by them as compensation or consideration for renting rooms in the county. Buncombe County’s declaratory judgment action sought a ruling declaring “its affirmative rights to audit and collect occupancy tax obligations owed by these Defendants to [] Plaintiff.”

In Issue I, we held that the enabling legislation enacted by our General Assembly as to Buncombe, Dare, Mecklenburg, and Wake counties allowing the counties to impose an occupancy tax by resolution did not encompass the transactions wherein consumers rented lodging accommodations through defendants’ websites. Therefore, as plaintiffs cannot establish that defendants were under a legal obligation based on their individual occupancy tax resolutions to collect and remit taxes to the respective county, plaintiffs cannot prevail on their demands for accounting. Accordingly, we overrule plaintiffs’ argument and affirm the trial court’s ruling dismissing plaintiffs’ demand for accounting.

Conversion

[5] First, we note that while claims of conversion were asserted in the complaints of Dare County, Mecklenburg County, and Wake County,

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the trial court addressed only Mecklenburg County's conversion claim in the trial court's summary judgment order.

On 19 November 2007, the trial court granted defendants' 12(b) (6) motion to dismiss the conversion claims brought by plaintiffs Buncombe County, Dare County, and Wake County. No appeal was taken by Buncombe County, Dare County, and Wake County from these dismissals.

On 14 January 2008, Mecklenburg County filed its complaint asserting a claim for conversion. In its complaint, Mecklenburg County alleged the following:

Defendants, upon information and belief, keep the difference between the amount of Tax charged to the public and the amount of Tax remitted to the hotel, motel, or inn, which then remits this lower tax amount to the County. At all times herein mentioned, Defendants wrongfully possessed and/or controlled the monies which constitute this difference between the amount of Tax charged to the public and the amount of Tax remitted to the County. Defendants have converted or taken these Tax monies for their own use and benefit, thereby permanently depriving the County of the use and benefit thereof.

Following the assignment of Mecklenburg County's complaint to the business court and the consolidation of these actions, both plaintiffs and defendants filed motions for summary judgment. The trial court addressed only Mecklenburg County's claim for conversion in its summary judgment order and dismissed the claim.

"In North Carolina, conversion is defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Myers v. Catoe Constr. Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986) (citation omitted).

The general rule is that there is no conversion until some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property. Therefore, two essential elements are necessary in a claim for conversion: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant.

Bartlett Milling Co. v. Walnut Grove Auction & Realty Co., 192 N.C. App. 74, 86, 665 S.E.2d 478, 489 (2008) (citation and quotations omitted).

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“[T]he general rule is that money may be the subject of an action for conversion only when it is capable of being identified and described.” *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 528, 723 S.E.2d 744, 750 (2012) (citation omitted).

The requirement that there be earmarked money or specific money capable of identification before there can be a conversion has been complicated as a result of the evolution of our economic system. Recognizing this reality, numerous courts around the country have adopted rules requiring the specific identification of a sum of money, rather than identification of particular bills or coins.

Id. at 528-29, 723 S.E.2d at 750 (citations and quotations omitted). “In the context of this conversion claim, we conclude that funds transferred electronically may be sufficiently identified through evidence of the specific source, specific amount, and specific destination of the funds in question.” *Id.* at 529, 723 S.E.2d at 750-51 (addressing a claim involving transfers of funds in specific dollar amounts totaling approximately \$888,000.00).

Here, Mecklenburg County’s conversion claim is not one for a specific amount of taxes alleged due, much less particular bills and coins; rather, Mecklenburg County’s claim is for a category of monies allegedly owed, taxes. Even reading *Variety Wholesalers, Inc.*, broadly to presume that in the context of any conversion claim where funds are transferred electronically the establishment of the funds’ specific source, specific amount, and specific destination is sufficient to connote identification, Mecklenburg County’s complaint fails to allege such requirements. *See id.*; *see also State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 57, 571 S.E.2d 836, 844 (2002) (holding the evidence supported the conversion claim where the spouse of the decedent, acting as an administratrix, failed to properly distribute the decedent’s share of three \$75,000.00 certificates of deposit as a portion of his estate). Therefore, we see no error in the trial court’s dismissal of Mecklenburg County’s conversion claim.

Constructive Trust

[6] A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

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Variety Wholesalers, Inc., 365 N.C. at 530, 723 S.E.2d at 751 (citation omitted).

Here, plaintiffs have been unable to establish any genuine issue of material fact as to whether defendants have retained monies collected from the rental of accommodations in the respective counties which were “acquired through fraud, breach of duty or some other circumstance making it inequitable for [defendants] to retain it[.]” *Id.* As such, summary judgment was appropriate. Accordingly, we affirm the trial court’s dismissal of plaintiffs’ claims seeking imposition of a constructive trust.

Affirmed.

Judges McGEE and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 AUGUST 2014)

BRAWLEY v. ELIZABETH TOWNES HOMEOWNERS ASS'N, INC. No. 14-135	Iredell (13CVS1289)	Affirmed
ESTATE OF SCURLOCK v. WELLS FARGO HOME MTGE., INC. No. 13-1254	Durham (12CVS5773)	Affirmed
FOSS v. MILLER No. 13-1451	Iredell (05CVD2831)	Affirmed in Part; Reversed and Remanded in Part
HARRIS v. BALLANTINE No. 13-1041	Guilford (12CVS5643)	Vacated and Remanded
HOMETRUST BANK v. TSIROS No. 14-267	Buncombe (12CVS5768)	Reversed in part; affirmed in part
IN RE C.A. No. 13-1468	Wake (12JT137-138)	Affirmed
IN RE C.D.P. No. 13-1438	Wake (09JB532)	Reversed and Remanded
IN RE C.E.C.B. No. 14-164	New Hanover (10JT159-161)	Affirmed
IN RE H.S. No. 14-292	Swain (10JT28-30)	Affirmed
IN RE J.D.G. No. 14-117	Randolph (13JB23)	Affirmed
IN RE K.B.J.N. No. 14-352	Mecklenburg (12JT308-309)	Affirmed in Part; Remanded in Part
IN RE K.H. No. 14-211	Guilford (12JA42-44)	Affirmed
IN RE K.M.D. No. 14-370	Surry (12JT25)	Affirmed
IN RE K.R.M. No. 14-248	Cumberland (10JT89-90)	Affirmed
IN RE M.S. No. 14-348	Forsyth (11JT216)	Affirmed

IN RE S.B.O. No. 14-299	Brunswick (12JT09-11)	Affirmed
IN RE W.J.B. No. 14-351	Rutherford (12JT7)	Affirmed
JUSTICE v. MAYES No. 13-1216	McDowell (11CVS1014)	Affirmed
K2 ASIA VENTURES v. TROTA No. 13-1376	Forsyth (09CVS2766)	Affirmed
LAWS v. LAWS No. 14-55	Alamance (03CVD2839)	Affirmed
PACKERS PRINTING & PUBL'G CO., INC. v. ANAJET, LLC No. 13-1449	Columbus (13CVS675)	Affirmed
STATE v. BLANKS No. 14-282	Bladen (12CRS50891)	No prejudicial error
STATE v. BROWN No. 14-278	New Hanover (13CRS54532)	No Error
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STATE v. KEANE No. 14-171	Wake (08CRS76979)	No Error
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STATE v. LEWIS No. 14-20	Cabarrus (08CRS7351)	No Error
STATE v. LUCAS No. 14-245	Guilford (11CRS81948)	Reversed and Remanded
STATE v. MATTHEWS No. 14-109	Mecklenburg (11CRS219314)	No Error
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ACCOUNTANTS AND ACCOUNTING

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APPEAL AND ERROR

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Interlocutory orders and appeals—attorney fees award—Industrial Commission—amount of award not yet determined—The Court of Appeals lacked jurisdiction to hear appellant insurance company's argument that the Industrial Commission erred in its determination that an award of attorney fees was appropriate. The Commission had not yet determined the specific amount to be awarded and the Court will not consider an appeal of an attorney fees award until the specific amount of the award has been determined by the trial tribunal. **Salvie v. Med. Ctr. Pharmacy of Concord, Inc., 489.**

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Interlocutory orders and appeals—dismissal—Defendant's appeal from interlocutory orders denying his motion for summary judgment directed to plaintiff's equitable distribution claim and granting plaintiff's motion for summary judgment with respect to one of the grounds upon which defendant sought to challenge the validity of her equitable distribution claim was dismissed. **Holbert v. Holbert, 277.**

Interlocutory orders and appeals—pending motion to modify child custody—failure to argue substantial right—Both parties' appeals in a child custody case were from an interlocutory order based on plaintiff's outstanding motion to modify custody. The parties failed to argue a substantial right would be affected absent immediate review, and thus, their appeals were dismissed. **Sarno v. Sarno, 597.**

Interlocutory orders and appeals—preliminary injunction—substantial right—Defendant's appeal from the trial court's interlocutory order enjoining him from violating non-compete provisions contained in an agreement he had entered into with his former employer was heard on the merits. North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions in cases involving an alleged breach of a non-competition agreement. **N. Star Mgmt. of Am., LLC v. Sedlacek, 588.**

Interlocutory orders and appeals—Rule 54(b) certification—An appeal from an interlocutory order in a rezoning case was heard on the merits where the trial court certified pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there was no just reason to delay appeal of those claims. **Etheridge v. Cnty. of Currituck, 469.**

APPEAL AND ERROR—Continued

Interlocutory orders and appeals—temporary child support order—Defendant's appeal from the trial court's order denying his motion to modify child support was dismissed as interlocutory. The temporary order provided for payment of child support until a pending motion to modify custody could be determined and child support set based upon the actual custodial schedule. **Gray v. Peele, 554.**

Issue not before the court—argument dismissed—Defendant's argument that the trial court erred in concluding that the covenants included in the 2010 Asset Purchase Agreement applied because they were superseded by the covenants set forth in the 2010 Consulting Agreement was dismissed. The issue was not properly before the Court of Appeals because the trial court only enjoined defendant from continued violations of the covenants contained in the Consulting Agreement. **N. Star Mgmt. of Am., LLC v. Sedlacek, 588.**

Preservation of issues—failure to move to dismiss—Defendant's argument in a felonious hit and run case that the State did not present sufficient evidence of the crime was dismissed. Defendant failed to move to dismiss the charge at the close of the State's evidence or at the close of all the evidence. **State v. Williams, 211.**

Preservation of issues—failure to raise constitutional issue at trial—Although plaintiff alternatively argued that N.C.G.S. § 97-12.1, as applied in this case, was an unconstitutional ex post facto law, defendant failed to raise this argument at trial. Even if this issue were preserved, it would be without merit since N.C.G.S. § 97-12.1 does not involve a criminal offense. **Purcell v. Friday Staffing, 342.**

Preservation of issues—failure to raise issue—Although respondent argued that the trial court erred by failing to make a finding about Katherine Carmichael's capacity in a case regarding her renunciation of her interest in real property, this issue was not preserved. Respondent's motion for summary judgment, as well as respondent's response to the petition for partition, failed to raise the issue of her lack of capacity. **Carmichael v. Lively, 222.**

Preservation of issues—insufficient notice—failure to argue—The trial court did not err by dismissing plaintiff counties' claim that defendant online travel companies were contractually obligated to collect and remit an occupancy tax. There was insufficient notice of a contractual obligation claim. Further, plaintiffs raised this claim for the first time in a motion for summary judgment and on appeal. **Wake Cnty. v. Hotels.com, LP, 633.**

Preservation of issues—no objection at trial—plain error review not requested—no error—Defendant abandoned his argument concerning a written medical report in a prosecution for rape of a child and other offenses where he did not object at trial, did not request plain error review, and did not make the report a part of the record on appeal. **State v. King, 187.**

Preservation of issues—supporting authority—not sufficient—Plaintiff's argument concerning defendant's attempt to call plaintiff's counsel to testify at trial was deemed abandoned where the sole citation to authority in plaintiff's brief was for the standard of review. Furthermore, there must be compelling reasons for a court to permit a lawyer for a party to testify; the trial court here did not abuse its discretion by denying defendant's request to call plaintiff's counsel to testify concerning the competency and preparation of their witness. **GRE Props. Thomasville LLC v. Libertywood Nursing Ctr., Inc., 266.**

APPEAL AND ERROR—Continued

Writ of certiorari—notice of appeal—Defendant's petition for writ of certiorari was denied and the Court of Appeals proceeded to the merits of his appeal. Defendant's written notice of appeal from the order directing his enrollment in a satellite-based monitoring program was not fatally defective since defendant's intent to appeal could be fairly inferred and the State provided no indication it was misled by defendant. **State v. Williams, 201.**

ATTORNEY FEES

Child custody and support—custody still at issue—findings—Child custody was still at issue when a judgment concerning child support was entered and the trial court was not required to find that plaintiff had refused to provide prior support to the child when awarding attorney fees. Although plaintiff and defendant may have believed and acted as though they had resolved the custody claims before entry of the order, custody was still at issue when the case was called for hearing and was not addressed by the trial court until its final order. **Loosvelt v. Brown, 88.**

Child custody and support—findings sufficient—no necessity for ability to pay—The trial court made sufficient findings of fact to support the award of attorney fees in a child custody and support action. There is no requirement of a finding that the party being ordered to pay have the ability to pay. **Loosvelt v. Brown, 88.**

Rezoning—government acted outside legal authority—no abuse of discretion—The trial court did not err in a rezoning case by denying plaintiffs' request for attorney fees. Under the plain language of N.C.G.S. § 6-21.7, a trial court must find that: (1) a local government acted outside the scope of its legal authority; and (2) that the act in question constituted an abuse of discretion before the court is required to award attorney fees. In this case, the trial court did not explicitly find that defendant abused its discretion in its rezoning decision and there was sufficient evidence for the trial court to decide that the rezoning was not an abuse of discretion. **Etheridge v. Cnty. of Currituck, 469.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Dependency—clerical error—Although the Department of Social Services filed petitions alleging that the juveniles were both neglected and dependent, it only argued that they were neglected at the adjudication hearing. Thus, the trial court's checking of the box for dependency represented a clerical error. **In re J.C., 69.**

Neglect—findings of fact—The trial court did not err by adjudicating the juveniles neglected based on the evidence and the trial court's findings of fact. **In re J.C., 69.**

CHILD CUSTODY AND SUPPORT

Motion to modify—insufficient findings of fact and conclusions of law—A custody order denying defendant's motion to modify the custody of his younger two children was remanded for additional findings of fact and conclusions of law fully addressing defendant's motion to modify custody. **D'Alessandro v. D'Alessandro, 458.**

Pre-birth non-medical expenses—not allowed—In an action to establish paternity, custody, and support, an award for nursery expenses and maternity clothes incurred prior to the child's birth was reversed. The legal obligation arises when the child is born and expenses incurred prior to the child's birth cannot be considered as

CHILD CUSTODY AND SUPPORT—Continued

retroactive child support, with the only exception being medical expenses as allowed by statute. While it is reasonable to incur expenses in preparation for the birth of a baby, there is no evidence or argument that nursery expenses and maternity clothes could qualify as “medical expenses” under even the most generous definition. **Loosvelt v. Brown, 88.**

Retroactive support—ability to pay—relevant time period—An award of retroactive child support for post-birth expense for daycare, child care, and the child’s birth was remanded for findings as to plaintiff’s ability to pay during the time period for which reimbursement was sought. **Loosvelt v. Brown, 88.**

Retroactive support—allotment of expenses—An award of retroactive child support was remanded partly because the appellate court could not discern from the findings why the trial court failed to allot any portion of the retroactive expenses as defendant’s responsibility. **Loosvelt v. Brown, 88.**

Retroactive support—post-birth expenses—date incurred—insufficient evidence—A retroactive child support award for nursery expenses and basic needs incurred after the child’s birth was reversed for insufficient evidence that the expenses were incurred prior to filing the complaint. **Loosvelt v. Brown, 88.**

Support—child’s reasonable needs—findings—Where a child support award was remanded for other reasons, the trial court was also instructed to make findings of fact with monetary values as to the child’s reasonable needs in light of the abilities of the parents to provide support. The amount of child support ordered far exceeded the actual needs of the child based upon the child’s historical individual expenditures. Although the trial court has the discretion to award child support in excess of actual historical expenses based upon plaintiff’s financial position, the findings of fact as to how this amount was established must be detailed enough to permit appellate review. **Loosvelt v. Brown, 88.**

Support—earnings and conditions of parties—non-quantifiable contributions—findings—Where a child support order was remanded for several reasons, the trial court was ordered on remand to take into account the earnings, conditions and standard of living of both parties in a manner reviewable on appeal. Not all of the factors under N.C.G.S. § 50-13.4(c) can be quantified and it is appropriate for the trial court to consider the fact that defendant bears 100% of the daily responsibilities of child care and making a home for the child. If the court does so, it should make reviewable findings. **Loosvelt v. Brown, 88.**

Support—plaintiff’s income—findings—An award of prospective child support was remanded for findings as to the monetary value of plaintiff’s income and any other findings of fact or conclusions of law necessary to set an appropriate child support amount. The trial court’s findings listed plaintiff’s average gross monthly income and stated that plaintiff “is a man with substantial income,” but there was no finding as to plaintiff’s actual income. Furthermore, the income on which the court based the finding that plaintiff was able to pay the child support ordered was not clear, and it did not make any findings which would permit consideration of plaintiff’s estate as supporting his ability to pay child support. **Loosvelt v. Brown, 88.**

CHILD VISITATION

Supervised visitation—costs—opportunity to present evidence—modification—The trial court did not err by ordering respondent mother to pay the costs of

CHILD VISITATION—Continued

her supervised visitation. Respondent has ample opportunity to present evidence of her inability to pay the cost of supervised visitation and have the visitation plan modified, should the need arise. **In re J.C.**, 69.

CIVIL PROCEDURE

Two dismissal rule—Rule 41—inapplicable—judicial foreclosure—foreclosure by power of sale—The trial court did not err in an action involving an unpaid promissory note by denying defendants' motion to dismiss and for summary judgment. The "two dismissal rule" of Rule 41 of the Rules of Civil Procedure was not applicable to plaintiff's claim for judicial foreclosure where plaintiff had previously dismissed two claims for foreclosure by power of sale. Plaintiff's claims for foreclosure by power of sale could not, as a form of special proceeding, have been brought in the same action as a claim for money judgment on a promissory note. A different trial court did err in a prior proceeding by dismissing plaintiff's claim for judicial foreclosure as plaintiff could not have brought this claim in the same action as its claims for foreclosure by power of sale. **Lifestore Bank v. Mingo Tribal Pres. Tr.**, 573.

CONSTITUTIONAL LAW

Effective assistance of counsel—contempt hearing against counsel during trial—Defendant received effective assistance of counsel even though he argued that his counsel's representation was prejudiced by the trial court's failure to grant an adjournment until the next day after defense counsel was the subject of a contempt hearing. The record did not reveal a conflict of interest between defendant and his counsel, defendant neither pointed to an error committed as a result of the criminal contempt hearing nor asserted a burden that would have been alleviated by an overnight recess, counsel was not found to be in contempt of court, and defendant was found not guilty on twenty-five of twenty-six charges considered by the jury. **State v. King**, 187.

Effective assistance of counsel—failure to move to dismiss—no prejudice—Defendant did not receive ineffective assistance of counsel in a felony hit and run case where his trial counsel did not move to dismiss the charge at either the close of the State's evidence or at the close of all the evidence. Defendant failed to show that there was a reasonable probability that, but for counsel's failure to make a motion to dismiss, the result of the proceeding would have been different where the trial court properly submitted the issue of whether defendant knew or should have known that his vehicle had struck a person. **State v. Williams**, 211.

Effective assistance of counsel—stipulation to report—trial strategy—Defendant did not receive ineffective assistance of counsel in a sexual offenses case when his trial attorney stipulated to the admission of a licensed clinical social worker's redacted report and failed to object to the trial court's instruction regarding the report. The record did not provide sufficient information to determine whether trial counsel's decision to agree to the stipulation of the report was the result of a legitimate trial strategy. **State v. Berry**, 496.

CONTEMPT

Civil—appointment of counsel—possibility of incarceration—The trial court erred in a civil contempt and child custody case by ordering that defendant be

CONTEMPT—Continued

incarcerated for civil contempt without the benefit of appointed counsel to represent him at the hearing that resulted in his incarceration. **D'Alessandro v. D'Alessandro, 458.**

Continuing—discovery sanctions—The trial court did not abuse its discretion by finding that plaintiff was in continuing civil contempt at the time of a show cause hearing concerning discovery violations where plaintiff claimed he could not have been in continuing civil contempt because the contempt order had not yet been issued. Even assuming an inaccurate use of the phrase, plaintiff did not offer a persuasive argument for vacating the sanctions order, given the abundant evidence supporting the court's decision to impose sanctions on plaintiff. **Keese v. Hamilton, 315.**

CONTRACTS

Agreement to divide estate—consideration—actions by family member—Summary judgment was properly granted for defendant in an action between two nephews who acted as power of attorney for an uncle regarding their alleged oral agreement while their uncle was alive to divide the estate, and their uncle leaving the estate to defendant. Although plaintiff argued that action to his detriment after his uncle's death was evidence of the contract, those actions were not contemplated at the time of the agreement and could not constitute consideration. Furthermore, plaintiff conceded that he would have acted as power of attorney and performed services for his uncle regardless of any agreement with defendant and expected no compensation. **Lewis v. Lester, 84.**

Breach of contract—non-compete agreement—trial court's authority to revise the agreement—The trial court erred in a case involving a non-compete agreement by granting summary judgment against plaintiff on its breach of contract claim. Pursuant to the terms of the agreement, the trial court had express authority to revise the territorial restrictions in the agreement. The matter was remanded for the trial court to revise the geographic territories to include those areas reasonably necessary to protect plaintiff's business interests. Furthermore, there was a genuine issue of material fact as to whether defendant violated the terms of the agreement. **Beverage Sys. of Carolinas, LLC v. Associated Beverage Repair, LLC, 438.**

Non-compete agreement—terms of the agreement—applicable law—The trial court correctly concluded that New Jersey law governed its determination concerning the enforceability of the parties' non-compete covenants. The language of the terms of the parties' agreement manifested this intent. **N. Star Mgmt. of Am., LLC v. Sedlacek, 588.**

Oral agreement to divide estate—real property included—statute of frauds—Summary judgment was correctly granted to defendant in a case involving two nephews who held powers of attorney for an uncle and who allegedly orally agreed to divide the estate, which the uncle willed to one of them. The alleged oral agreement was to divide an estate which included both real and personal property and was therefore not enforceable because it was not in writing. **Lewis v. Lester, 84.**

CONVERSION

Taxes—not a specific amount—category—The trial court did not err by dismissing Mecklenburg County's claim for conversion. The claim was not one for a specific

CONVERSION—Continued

amount of taxes alleged due, much less particular bills and coins, but instead was for a category of monies allegedly owed which was taxes. **Wake Cnty. v. Hotels.com, LP, 633.**

COSTS

Expert witness fees—witnesses not under subpoena—The trial court erred in a medical malpractice case by granting expert witness fees as costs to defendants pursuant to N.C.G.S. § 7A-305 when the witnesses were not under subpoena. **Lassiter v. N.C. Baptist Hosps., Inc., 482.**

CRIMINAL LAW

Defendant's escape attempt—increased security—individual inquiry not made—The trial court did not err or violate defendant's due process rights by failing to individually ask the jurors whether they had been affected by increased security after defendant attempted to escape during trial. Under these facts, a general inquiry of the jury regarding their exposure to media coverage of the trial was sufficient to ensure that they had not been exposed to improper, prejudicial material. **State v. Jackson, 384.**

Defendant's escape attempt during trial—additional security—jury instructions—Given the facts of the case, the trial court did not abuse its discretion or violate defendant's constitutional rights by ordering physical restraints on defendant, additional security in the courtroom, and an escort for the jury at the end of the day after defendant attempted to escape during his trial for murder and armed robbery. The jury was sequestered in the jury room at the time and was told only that there had been a security incident. The trial court specifically instructed the jury not to consider the use of restraints and the jury had no way to know that the security issue of the previous day was related to defendant's trial until evidence of defendant's escape was introduced. **State v. Jackson, 384.**

Motion to suppress—minimum requirements—Defendant satisfied the minimum requirements for a motion to suppress driving while impaired blood test results and did not waive his right to argue a violation of his Fourth Amendment rights. Defendant's motion to dismiss on Fourth Amendment grounds may be treated as a motion to suppress even though it was not verified, because his motion to suppress based on a Sixth Amendment challenge was verified and contained substantially the same factual allegations. **State v. Granger, 157.**

DEEDS

Declaration of title—rightful title holders—reversionary interest—directed verdict—The trial court erred by denying the Town's motion for a directed verdict at the close of plaintiffs' evidence and again at the close of all evidence in an action where plaintiffs sought a declaration of title recognizing them as the rightful title holders of certain real property and seeking recovery of rents. As a matter of law, the language relied upon by plaintiffs was precatory and could not trigger plaintiffs' reversionary interest in the Camp Hope property. The case was remanded to the trial court for entry of judgment in favor of defendant on directed verdict. **Prelaz v. Town of Canton, 147.**

DEEDS—Continued

Deed of trust—promissory note—holder of note—The trial court erred in an action involving an unpaid promissory note by granting summary judgment in favor of plaintiff. There was a material issue of genuine fact as to whether plaintiff was the holder of the note. **Lifestore Bank v. Mingo Tribal Pres. Tr.**, 573.

Quitclaim deed—renunciation filed subsequently had no effect—The trial court did not err by concluding that as of the date of the quitclaim deed, Katherine Carmichael and petitioner owned a one-half undivided interest in the Townes Road Property. Because a copy of the renunciation was not filed with the register of deeds until 15 June 2006, subsequent to the filing of the quitclaim deed, it had no effect on the interests of petitioner and Katherine Carmichael in the Townes Road Property. **Carmichael v. Lively**, 222.

Renunciation of real property—effective when filed with register of deeds—The trial court did not err by concluding that the renunciation of real property dated June 11, 2004, and filed with the clerk of court on 4 November 2004 did not take effect until filed with the register of deeds on 15 June 2006. **Carmichael v. Lively**, 222.

Rescission of renunciation—revocation—The trial court did not err by concluding that the rescission of renunciation executed by Katherine Carmichael on 28 December 2004 and filed with the clerk of court and register of deeds on 29 December 2004 rescinded and revoked the 11 June 2004 renunciation as to the real property owned by the decedent. **Carmichael v. Lively**, 222.

Restrictive covenants—prohibition of convenience store—The trial court did not err in a declaratory judgment action by granting summary judgment in favor of plaintiffs declaring that the construction and operation of a Family Dollar store upon plaintiffs' real property did not violate the restrictive covenant contained in a deed which prohibited the operation of a "convenience store" on that tract. The language in the deed merely prevented the type of store that could operate on the vacant tract. **E. Pride, Inc. v. Singh**, 15.

DISCOVERY

Sanction—failure to instruct jury—defense of entrapment—lack of notice of defense—The trial court abused its discretion in a delivery of cocaine case by failing to instruct the jury on the defense of entrapment as a discovery sanction under N.C.G.S. § 15A-910(a) for failure to provide specific information as to the nature and extent of the defense. The trial court made no findings of fact to justify imposition of such a harsh sanction, and the State had not shown that it suffered any prejudice from the lack of detail in the notice filed eight months prior to trial. **State v. Foster**, 365.

DRUGS

Delivery of cocaine—jury instruction—entrapment—The trial court erred in a delivery of cocaine case by failing to instruct the jury on the defense of entrapment. Defendant presented sufficient evidence that an undercover officer tricked him into believing that the officer was romantically interested in defendant in order to persuade defendant to obtain cocaine for him, that defendant had no predisposition to commit a drug offense such as delivering cocaine, and that the criminal design originated solely with the officer. **State v. Foster**, 365.

DRUGS—Continued

Trafficking in cocaine—failure to consider lesser-included offense—manufacturing cocaine—no plain error—The trial court did not commit plain error in a prosecution for trafficking in cocaine by manufacturing by failing to allow the jury to consider the issue of defendant's guilt of the lesser-included offense of manufacturing cocaine. There was no record support for the proposition that defendant engaged in manufacturing activities with respect to some amount of cocaine less than that necessary to establish his guilt of a trafficking offense. **State v. Miranda, 601.**

Trafficking in cocaine—manufacturing—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of trafficking between 28 and 200 grams of cocaine by manufacturing. The State's evidence showed that more than 28 grams of cocaine and several items that are commonly used to weigh, separate, and package cocaine for sale were seized from defendant's bedroom; and that the cocaine and cocaine-related mixture found in the pill bottle located behind the mirror in defendant's bedroom were packaged in plastic bags. **State v. Miranda, 601.**

Trafficking in cocaine—requested jury instruction—intent to deliver—no plain error—The trial court did not commit plain error by failing to instruct the jury that it had to find beyond a reasonable doubt that defendant manufactured cocaine with the intent to distribute before convicting him of that offense. Defendant failed to establish that a different outcome would probably have been reached had the instruction been delivered at trial. **State v. Miranda, 601.**

Trafficking in cocaine—sufficiency of indictment—subject matter jurisdiction—The trial court did not lack subject matter jurisdiction to try defendant and to enter judgment against him for the crime of trafficking in between 28 and 200 grams of cocaine by manufacturing even though defendant contended that the indictment was fatally defective. The relevant count in the indictment returned against defendant alleged all of the elements of the offense of trafficking in between 28 and 200 grams of cocaine by manufacturing. **State v. Miranda, 601.**

ESTATES

Administration—need for funds in joint checking account—factual issue for jury—The trial court erred by failing to properly instruct the jury on the issue of whether funds contained in a joint checking account were necessary to satisfy the claims against the estate. It is clear from the jury instructions that the trial court failed to direct the jury to determine whether the funds were actually needed to satisfy claims against the estate. Although plaintiffs argued that the error was cured by the trial court's insertion of language in the judgment, the question of whether the estate needed the funds to satisfy claims against the estate was a factual issue for the jury. **Fortner v. Hornbuckle, 247.**

ESTOPPEL

Judicial estoppel—caveat action—petition for elective share—The trial court abused its discretion by applying judicial estoppel as a bar to a caveat action after the trial court ordered payment of an elective share. Caveator's statement in his petition for an elective share was consistent with the determination made by the clerk and the legal presumption that the purported will was the valid will of decedent until set aside by a caveat action. **In re Will of Shepherd, 298.**

ESTOPPEL—Continued

Quasi-estoppel—receipt of elective share—The trial court erred in a caveat proceeding challenging a will by granting summary judgment in favor of propounder based on caveator's receipt of an elective share. Caveator cannot be estopped from pursuing the caveat action based on his receipt of the elective share because he would be entitled to that amount of cash in any event. Further, he has not exercised a right under the will to any specific property he would not otherwise be entitled to receive. **In re Will of Shepherd, 298.**

Two voluntary dismissals—foreclosure by power of sale—claim for money judgment—no final judgment—The trial court did not err in a case involving an unpaid promissory note by granting plaintiff's motion for summary judgment. Plaintiff's two voluntary dismissals of its actions for foreclosure by power of sale did not act as collateral estoppel upon plaintiff's claims for money judgment because no final judgment had been reached. Further, the nature of these actions — foreclosure by power of sale, judicial foreclosure, and money judgment — are such that these actions, and the issues raised in each, differ. **Lifestore Bank v. Mingo Tribal Pres. Tr., 573.**

EVIDENCE

Attempted escape during trial—admissible—The trial court did not abuse its discretion in a prosecution for murder and armed robbery by admitting evidence of defendant's attempted escape during his trial. Although defendant persuasively argued that evidence of his escape was highly prejudicial, the evidence was not unfairly prejudicial. The inference that defendant attempted to escape because he is guilty is precisely the inference that makes evidence of flight relevant. **State v. Jackson, 384.**

Character—honesty—trustworthiness—substantive evidence—A de novo review revealed that the trial court did not err in a committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder case by refusing to instruct the jury that it could consider evidence concerning defendant's character for honesty and trustworthiness as substantive evidence of his guilt or innocence. A person exhibiting those character traits was not necessarily less likely than others to commit these crimes. **State v. Clapp, 351.**

Character—working well with children—no unnatural lust or desire to have sexual relations with children—A de novo review revealed that the trial court did not err in a committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder case by refusing to allow a former member of the coaching staff to testify that defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. The excluded testimony did not tend to show the existence or non-existence of a pertinent character trait. **State v. Clapp, 351.**

Characteristics of sexually abused children—no opinion on credibility—There was no error in a prosecution for the rape of a child and other offenses in the trial court allowing the testimony of a doctor which defendant contended presumed that the victim was telling the truth. The testimony properly provided common characteristics the doctor observed in sexually abused children and a possible basis for those characteristics, and not opinion testimony on this victim's credibility. **State v. King, 187.**

EVIDENCE—Continued

Prison letter—written in Crip code—admissible—The trial court did not err in a prosecution for robbery and murder by admitting a letter defendant wrote while in jail that was in Crip code and by allowing the State to ask him on cross-examination whether he was in a gang. The letter itself was relevant and not unfairly prejudicial because defendant solicited in the letter the murder of one of the State's primary witnesses against him. Moreover, evidence relating to defendant's gang membership was necessary to understand the context and relevance of the letter. **State v. Jackson, 384.**

Redacted report—stipulation—jury instruction—not an expression of opinion—not prejudicial—The trial court did not err in a sexual offenses case by instructing the jury to accept as true a redacted interview report by a licensed social worker that was entered into evidence by the State. The trial court did not express an opinion in its limiting instruction to the jury, and taken as a whole, the instructions did not prejudice defendant. **State v. Berry, 496.**

SBI agent testimony—no prejudice—sentencing—The trial court did not err in a second-degree murder sentencing hearing by overruling defendant's objection and motion to strike an SBI agent's testimony. The agent explained that where no DNA match is found, the person in question could not have committed the crime. Contrary to defendant's contention, the agent did not affirmatively state that when a DNA match is found, the subject definitely committed the crime. Even assuming, without deciding, that the testimony lacked relevance, defendant failed to show that any such error was prejudicial. **State v. Hurt, 174.**

Stipulation—plain error not applicable—The trial court did not commit plain error in a sexual offenses case by admitting a licensed clinical social worker's redacted report into evidence. Defendant stipulated to the admission of the report at trial and agreed to the language of the stipulation and limiting instruction. The concept of plain error is not applicable to stipulations entered into at trial. **State v. Berry, 496.**

FIDUCIARY RELATIONSHIP

Debtor-creditor—right of redemption—trustee—The trial court did not err by dismissing plaintiffs' complaint under North Carolina Rule of Civil Procedure 12(b) (6) for failure to state a claim upon which relief could be granted. The statutory right of redemption created by N.C.G.S. § 45-21.20 does not give rise to a fiduciary relationship and plaintiffs failed to disclose any additional facts supporting the existence of a fiduciary relationship. Furthermore, as no facts indicated that the trustee or substitute trustee was joined as a defendant, no party owing a fiduciary duty to plaintiffs was a party to this breach of fiduciary duty claim. **In re Lynn v. Fed. Nat'l Mortg. Ass'n, 77.**

FRAUD

Misrepresentation—no reasonable reliance—due diligence—The trial court did not err by granting summary judgment in favor of the Kesiah defendants on plaintiffs' claims of fraud and misrepresentation where the evidence failed to establish reasonable reliance by plaintiffs. Any reliance would have been unreasonable in light of plaintiffs' independent home inspection report. Plaintiffs neither alleged nor produced any evidence that the alleged defects were not discoverable in the exercise of due diligence. **Folmar v. Kesiah, 20.**

GIFTS

Retained deeds—intent retain control—jury question—The trial court did not err by denying defendant's motion for a directed verdict in an action involving the apportionment of estate tax liability where the decedent had executed five deeds conveying real property but retained the deeds; the deeds were executed after his death; plaintiffs, the personal representatives of the estate, filed this action seeking to recover the apportioned share of the estate taxes; and defendant contended that the transfers had been gifts. The evidence was sufficient to raise a question for the jury as to whether the decedent intended to retain control over the properties at issue. **Fortner v. Hornbuckle, 247.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—relocation of operating rooms—substantial prejudice—not shown—In a certificate of need case involving the proposed relocation of two specialty ambulatory operating rooms by WakeMed, petitioners failed to show that the respondent's decision to grant WakeMed's application resulted in substantial prejudice, a necessary element of petitioner's attempt to successfully oppose the Agency decision. **Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs., 620.**

IMMUNITY

Governmental—police officer in car accident—immunity not available—In an automobile accident case involving a collision between a speeding officer and a car pulling out from a side road, summary judgment for the officer and the insurance companies would have been improper on the basis of governmental immunity, at least as to potential damages up to the amount of a \$25,000.00 bond,. Furthermore, it has been recognized that actions brought pursuant to N.C.G.S. § 20-145 fall outside the general rule of governmental immunity. **Truhan v. Walston, 406.**

INDICTMENT AND INFORMATION

Being a sex offender in a park—subsection of statute not specified—defendant sufficiently appraised of accusation—The trial court had subject matter jurisdiction over a prosecution for being a registered sex offender unlawfully on premises used by minors in violation of N.C.G.S § 14-208.18(a). Although defendant alleged that the indictment failed because the applicable subsection of the statute was not specified, the indictment alleged that defendant was within 300 feet of a bathing cage in a park and only one of the three subsections imputed a 300 foot requirement. Additionally, the indictment alleged that defendant was a person required to register as a sex offender and named the location where the purported offense occurred, so that defendant was sufficiently apprised of the nature of the conduct which was the subject of the accusation. **State v. Simpson, 398.**

INJUNCTIONS

Likelihood of success—breach of contract—The trial court erred by granting summary judgment on plaintiff's claim for injunctive relief. Because the Court of Appeals reversed and remanded the trial court's order granting summary judgment in favor of defendant on plaintiff's breach of contract claim, the trial court was required to determine whether there was a likelihood of success on the merits of plaintiff's breach of contract claim based on the revised non-compete. **Beverage Sys. of Carolinas, LLC v. Associated Beverage Repair, LLC, 438.**

INJUNCTIONS—Continued

Non-compete agreement—overly broad—reasonableness of geographic scope—reasonableness of scope of restricted activities—An order enjoining defendant from participating in certain activities based on the terms of a non-competition agreement was vacated and remanded where certain covenants were overly broad. The order was remanded for entry of findings with respect to the reasonableness of the geographic scope of the covenants and to tailor the geographic scope of the restrictions to that area that was reasonable under the circumstances as supported by the court's findings. The order was also remanded for entry of findings and conclusions with respect to the reasonableness of the scope of the restricted activities. **N. Star Mgmt. of Am., LLC v. Sedlacek, 588.**

JURISDICTION

Continuing—contempt order—compliance—The trial court had subject matter jurisdiction to preside over telephonic hearings concerning sanctions that took place after a contempt order was issued. The judge's commission was for one day or until business was completed and he had continuing jurisdiction to ensure compliance with the contempt order. **Keese v. Hamilton, 315.**

Personal—North Carolina Corporation—Nebraska judgment—A foreign judgment from Nebraska involving the purchase of a classic car was valid and enforceable in North Carolina where the Nebraska trial court properly exercised personal jurisdiction over the North Carolina defendant. Defendant intentionally directed its actions towards Nebraska, plaintiff's inability to use and enjoy the car resulted from defendant's contacts with Nebraska, it was foreseeable that any hindrance to plaintiff's use and enjoyment of the car caused by defendant's misrepresentations would occur in Nebraska, and defendant could reasonably have anticipated being haled into court in Nebraska. Defendant did not show that defending the suit in Nebraska would have been unduly burdensome to the extent that it would offend notions of fair play and substantial justice. **Meyer v. Race City Classics, LLC, 111.**

Standing—aggrieved party—appeal from small claims judgment—The trial court lacked jurisdiction over an appeal from a magistrate's judgment in a small claims action for breach of the implied warranty of habitability. Defendant was not an aggrieved party and thus had no standing to appeal the magistrate's judgment where defendant pled damages in excess of the amount available in a small claims action and then obtained all of the relief that defendant was able to obtain in the small claims court. **4U Homes & Sales, Inc. v. McCoy, 427.**

Subject matter—termination of parental rights—guardian ad litem program functions as team—The trial court did not lack subject matter jurisdiction in a termination of parental rights case. The General Assembly intended for abused, neglected, and/or dependent minor children to be represented by the guardian ad litem program and for the participants in that program to function as a team. Thus, the termination petition in this case was properly filed and verified even though it was not done by a guardian ad litem program specialist and not the volunteer guardian ad litem. **In re S.T.B., 290.**

Subject matter jurisdiction—appeal from judgment entered in district court—conviction on magistrate's order—no legal authority in superior court—The superior court lacked legal authority and, therefore, was without subject matter jurisdiction to try defendant on the offense alleged in the misdemeanor statement of charges when defendant was appealing from the judgment entered in

JURISDICTION—Continued

district court after a conviction on a magistrate's order. Defendant's conviction for resisting a public officer was vacated. **State v. Wall, 196.**

Subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—sufficiency of evidence—The trial court did not err in a child neglect case by allegedly failing to make adequate findings to establish its jurisdiction in light of a prior case in Kentucky. Although it would have been better for it to make more specific findings of fact to support its jurisdiction, the evidence was sufficient to support the trial court's assertion of jurisdiction pursuant to N.C.G.S. § 50A-201(a)(1). **In re J.C., 69.**

LANDLORD AND TENANT

Summary ejectment—jury instructions—The trial court did not err in denying defendant's request to add a special jury instruction on materiality in a summary ejectment case involving a nursing home. The pattern jury instruction, as applied in this case, sufficiently addressed the required elements for summary ejectment under North Carolina law. Assuming the trial court erred by failing to issue defendant's requested instruction on materiality, defendant was not prejudiced. **GRE Props. Thomasville LLC v. Libertywood Nursing Ctr., Inc., 266.**

MALICIOUS PROSECUTION

Intentional infliction of emotional distress—allegations in complaint—sufficient to state claims—not barred by statute of limitations—The trial court erred by dismissing plaintiff's claims for malicious prosecution and intentional infliction of emotional distress against defendants Thomas and Deaver. The allegations of the complaint, when treated as true, were sufficient to state claims for relief, and the complaint did not contain allegations establishing that those claims were barred by the statute of limitations. **Turner v. Thomas, 520.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—declaratory judgment action—pay-off and attorney fees—law of the case—The trial court did not invade the sole province of a foreclosure trustee when it determined that the trustee had misapplied the funds from a foreclosure sale where the pay-off amount and attorney fees had been set by the court in a prior declaratory judgment. If one superior court judge cannot overrule another, the trustee of a property in foreclosure lacks authority to overrule a superior court judge. Defendant lost the opportunity to challenge the trial court's decision when it failed to appeal the declaratory judgment. **Iris Enters., Inc. v. Five Wins, LLC, 311.**

Inflated appraisals—action against lenders—summary judgment for lenders—The trial court did not err by granting summary judgment for the lenders on claims arising from a failed land development plan that involved inflated appraisals where those claims were based in common law negligence and the Mortgage Lending Act (MLA). In North Carolina, there is no cause of action for negligent underwriting of loans for the purchase of real estate; even if there were, plaintiffs could not show justified reliance because they forecast no evidence that they made independent inquiries into the values of the lots or were prevented from doing so. The MLA did not apply because the loans were to finance the purchase of lots as investments and not for residential use. **Fazzari v. Infinity Partners, LLC, 233.**

NEGLIGENCE

Professional negligence—standard of care—expert testimony—The trial court did not err in a professional negligence case arising from water leaks in the plumbing of a clubhouse by granting summary judgment against plaintiff insurance company and in favor of defendant, a municipal corporation providing water to the clubhouse insured by plaintiff. Because the negligence claims could not have been properly evaluated with the common knowledge and experience of the jury, plaintiff bore the burden of producing expert testimony to establish the proper standard of care to which defendant should have been held. Because plaintiff failed to carry its burden of establishing a standard of care, the trial court's order granting summary judgment in defendant's favor was affirmed. Defendant's alternative argument on appeal that plaintiff was contributorily negligent was not addressed. **Frankenmuth Ins. v. City of Hickory, 31.**

PLEADINGS

Summary judgment—ripeness—affidavit required—Although plaintiffs argue that the forecast of evidence demonstrated that summary judgment was not ripe for hearing and that summary judgment should have been denied or the hearing continued, N.C.G.S. § 1A-1, Rule 56(f) required an affidavit by the opposing party stating the reasons why they were unable to present the necessary opposing material and the record revealed that plaintiffs failed to do so. **Folmar v. Kesiah, 20.**

POLICE OFFICERS

Automobile accident—negligence action—summary judgment for officer—erroneous—In an automobile accident case involving a collision between a speeding officer and a car pulling out from a side road, the trial court's grant of summary judgment for plaintiff (the officer) was reversed and the case was remanded for further action on defendant's counter-claims. Plaintiff was responding to a request for traffic control at the scene of a minor accident involving no injuries and, considering a number of other factors such as the terrain, the speed limit, the population and the time of day of the pursuit, there was a high probability of injury to the public despite the absence of significant law enforcement benefits. **Truhan v. Walston, 406.**

Employment termination—civil service hearing—not a probationary officer after consolidation—finding supported by evidence—In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department (CMPD), the trial court's finding that any changes in the nature and character of the plaintiff's employment were not substantive enough to result in his being classified as a probationary employee (and losing his right to a civil service appeal) was supported by evidence that plaintiff had been to some degree under the supervision of the CMPD since shortly after his initial hire. **Mazzeo v. City of Charlotte, 325.**

Employment termination—civil service hearing—oath retaken after consolidation—In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department, competent evidence existed to support a finding of fact that plaintiff was "re-sworn" as an officer with the Charlotte-Mecklenburg Police Department Airport Division, so that he was entitled to a civil service hearing. Both oaths were identical and both oaths were administered by the Deputy City Clerk of the City of Charlotte. **Mazzeo v. City of Charlotte, 325.**

POLICE OFFICERS—Continued

Employment termination civil service hearing—not a probationary officer after consolidation—conclusion—supported by finding—In an action arising from the employment termination of an airport safety officer and the denial of his civil service appeal after his consolidation into the Charlotte-Mecklenburg Police Department, the evidence supported the trial court's findings of fact which supported its conclusion that any changes in the nature and character of the plaintiff's employment were not substantive enough to result in his being classified as a probationary employee (and losing his right to a civil service appeal). **Mazzeo v. City of Charlotte, 325.**

PROCESS AND SERVICE

Default judgments—service by publication—improper—no general appearance—The trial court erred by denying defendant's motions to set aside default judgments because plaintiffs' service of process by publication was improper. There was no indication in the record that plaintiffs ever attempted service on defendant at his Skyview Drive address, despite having knowledge of said address. Furthermore, defendant did not make a general appearance before the entry of the default judgments and has not waived his objection to improper service of process. Because service by publication on defendant was invalid, the trial court did not possess personal jurisdiction over defendant when it entered the default judgments. As such, these default judgments were void. **Dowd v. Johnson, 6.**

SATELLITE-BASED MONITORING

Natural life—due process—rational relation—The trial court did not err in a second-degree rape case by imposing upon defendant enrollment in a satellite-based monitoring program for his natural life. Continuous monitoring as a result of defendant's participation in a satellite-based monitoring program did not violate defendant's substantive due process rights and the monitoring was rationally related to a legitimate governmental purpose. **State v. Williams, 201.**

SEARCH AND SEIZURE

Warrantless blood draw—exigent circumstances—findings—In a driving while impaired prosecution, there was competent evidence in the record to support contested findings about a warrantless blood draw after an automobile accident. More specifically, the findings involved the length of the delay before the blood draw and the officer's concerns about defendant's pain medication. **State v. Granger, 157.**

Warrantless blood draw—totality of circumstances—conclusion—The trial court's findings in a driving while impaired prosecution supported its conclusion that the totality of the circumstances showed that exigent circumstances justified a warrantless blood draw after a traffic accident. **State v. Granger, 157.**

SENTENCING

Aggravating factor—acting in concert—attempted armed robbery—Although defendant argued on appeal that the trial court erred in submitting the N.C.G.S. § 15A-1340.16(d)(2) aggravating factor when he was likely convicted of attempted armed robbery under an acting in concert theory, the Supreme Court has recently rejected that argument. **State v. Hill, 166.**

SENTENCING—Continued

Aggravating factor—especially heinous, atrocious, or cruel—sufficient evidence—The trial court did not err in a sentencing hearing on defendant's second-degree murder plea by denying defendant's motion to dismiss the aggravating factor that the offense was especially heinous, atrocious, or cruel. A lack of presence at or participation in a codefendant's gruesome murder does not preclude the submission to the jury of the especially heinous, atrocious, or cruel aggravating factor. Furthermore, in this case, a reasonable inference could have been drawn that defendant did actively participate in the murder of the victim. **State v. Hurt, 174.**

Failure to hold charge conference prior to instructing jury—new trial—The trial court erred in an attempted robbery with a firearm and assault with a deadly weapon inflicting serious injury case when it failed to hold a charge conference prior to instructing the jury during the sentencing phase of the trial, and therefore, the judgment was vacated and remanded for a new trial on sentencing. **State v. Hill, 166.**

Felony child abuse resulting in serious bodily injury—two separate offenses—charges not mutually exclusive—The trial court did not err by entering judgment on defendant's convictions for both felony child abuse resulting in serious bodily injury in violation of N.C.G.S. § 14-318.4(a3) and felony child abuse resulting in serious bodily injury in violation of N.C.G.S. § 14-318.4(a4). There was substantial evidence presented at trial permitting the jury to find that two separate offenses occurred in succession such that the two charges were not mutually exclusive. **State v. Mosher, 513.**

Mitigation phase—admission of exhibit—preference for live testimony—The trial court did not err during the mitigation phase of sentencing by excluding defendant's exhibit—a notebook prepared for the previous sentencing proceedings in the same case that contained recitations of another individual's multiple confessions, a forensic blood spatter expert report, and medical reports regarding defendant's alcohol consumption. Instead, the trial court informed defendant of its preference for live testimony and admitted parts of the notebook. Furthermore, defendant failed to show how the trial court's refusal to admit the exhibit in its entirety deprived him of the opportunity to present evidence of a mitigating factor. **State v. Hurt, 174.**

Subpoena—quashed—recitation of basis for guilty plea—not judicial admission—The trial court did not abuse its discretion in a sentencing hearing on defendant's second-degree murder plea by granting the State's motion to quash the subpoena of one of the prosecutors at the hearing on defendant's guilty plea. A recitation of the factual basis for a guilty plea is not a judicial admission. Therefore, the prosecutor's statements regarding the State's acceptance of defendant's guilty plea to second-degree murder did not establish his guilt as merely an aider and abettor rather than an active participant in the murder. **State v. Hurt, 174.**

SEXUAL OFFENDERS

Failure to register—false information on verification forms—The trial court did not err in a failure to register as a sex offender case by denying defendant's motion to dismiss based on the State's failure to show that one of the forms containing false information was actually required by law to be submitted. The schedule in N.C.G.S. § 14-208.9A does not excuse the provision of false information on verification forms submitted on other dates. **State v. Pressley, 613.**

SEXUAL OFFENDERS—Continued

Failure to register—motion to dismiss—submission of each form a distinct violation—The trial court did not err in a failure to register as a sex offender case by denying defendant's motion to dismiss based on his contention that he was charged twice for the same offense. The submission of each form constituted a distinct violation of N.C.G.S. § 14-208.11(a)(4). **State v. Pressley, 613.**

Failure to register—requested jury instruction—statutory intervals to submit forms—The trial court did not commit plain error in a failure to register as a sex offender case by failing to instruct the jury regarding the statutorily designated intervals at which such forms must be submitted. Because the statutory prohibition against sex offenders providing a false address to law enforcement officers applies to verification forms submitted at any time, there was no reason for the trial court to instruct the jury in the manner asserted by defendant. **State v. Pressley, 613.**

Presence in park with batting cages—evidence of use primarily intended for minors—insufficient—The trial court erred by denying defendant's motion to dismiss where he was arrested for being a registered sex offender close to batting cages in a park. While batting cages and ball fields may be used by minors, they are not intended primarily for minors absent special circumstances shown by the State. Here, the State's evidence rose only to a level of conjecture or suspicion that the batting cages and ball field were locations primarily intended for the use, care, and supervision of minors. **State v. Simpson, 398.**

SEXUAL OFFENSES

Sexual offense against 13, 14, or 15 year old child—taking indecent liberties with student while acting as first responder—requested jury instruction—law of accident—The trial court did not err in a committing a sexual offense against a 13, 14, or 15 year old child and taking indecent liberties with a student while acting as a first responder case by failing to give defendant's requested jury instruction concerning the law of accident. There was a complete absence of any evidence tending to show that defendant digitally penetrated the victim's vagina with his fingers in an accidental manner. Further, any error was rendered harmless by the trial court's subsequent decision to instruct the jury with respect to the issue of accident. **State v. Clapp, 351.**

TAXATION

Apportionment of estate tax—instructions—A case involving the apportionment of estate tax liability was remanded for an error in the instructions where the decedent executed deeds to transfer real property but held the deeds, the deeds were recorded after his death, and defendants contended that the transfers had been gifts. The confusion arose from the trial court's simultaneous and condensed discussion of the doctrines of completed gifts (requested by defendants) and retained interests (requested by plaintiffs). The two doctrines are related but have distinct elements and required separate consideration by the jury. **Fortner v. Hornbuckle, 247.**

Failure to remit—failure to show legal duty—The trial court did not err by dismissing plaintiff counties' claim that defendants collected but failed to remit taxes charged on the sales price paid by consumers. Plaintiffs failed to provide any authority that defendants had a legal duty to collect taxes. **Wake Cnty. v. Hotels.com, LP, 633.**

TAXATION—Continued

Occupancy tax—gross receipts from rentals—online travel companies not operators of hotels—The trial court did not err by determining that defendant online travel companies had no liability under the respective ordinances of Wake, Dare, Buncombe, and Mecklenburg Counties for failure to collect and remit an occupancy tax on the sale price defendants imposed on consumers. Defendants were not operators of hotels, motels, tourist homes, or tourist camps within the meaning of N.C.G.S. § 105-164.4(a)(3). Thus, the gross receipts defendants derived from the rentals were not subject to plaintiff counties' room occupancy tax. **Wake Cnty. v. Hotels.com, LP, 633.**

Property—exemption—charitable association—ownership requirements—The issue of whether the Property Tax Commission erred by holding that the Grandfather Mountain Stewardship Foundation (GMSF) satisfied the statutory ownership requirements for a property tax exemption for a charitable association was not reached because the property was not wholly and exclusively used for educational and scientific endeavors. It was not clear that GMSF would satisfy the ownership requirements even if the issue was addressed. **In re Appeal of Grandfather Mountain Stewardship Found., Inc., 561.**

Property—exemption—scientific and educational use—The North Carolina Property Tax Commission erred by granting the Grandfather Mountain Stewardship Foundation an exemption from property taxes based on scientific and educational activities.. The property was not wholly and exclusively used for educational and scientific endeavors. **In re Appeal of Grandfather Mountain Stewardship Found., Inc., 561.**

Property—exemption—scientific and educational use—use of income from property—The issue of whether the Property Tax Commission erred by basing its decision on whether to grant a property tax exemption on the use of income from the property was not reached. The property was not used wholly and exclusively for educational and scientific purposes. **In re Appeal of Grandfather Mountain Stewardship Found., Inc., 561.**

Property—exemption—vacant lot used as buffer—status—dependent on main parcel—A vacant lot owned by the Grandfather Mountain Stewardship Foundation did not qualify for a property tax exemption where it was found to be a buffer for Grandfather Mountain tourist park. The real property encompassing Grandfather Mountain tourist park was not eligible for the exemption because it was not wholly and exclusively used for educational and scientific endeavors and the status of the buffer lot was dependent on the status of the main parcel. The Property Tax Commission erred by concluding otherwise. **In re Appeal of Grandfather Mountain Stewardship Found., Inc., 561.**

Property tax—revaluation—appeal—timeliness—The Property Tax Commission properly concluded that Dixie Building's appeal of the revaluation of its properties was untimely. Although Dixie Building contended on appeal that it was permitted under N.C.G.S. § 105-322 to submit its appeal to the Guilford County Board at any time prior to the Board's adjournment for the year, Dixie Building's construction of the statute would place various subsections of the statute in conflict with each other. Reading the statute as a whole and in a manner that gave each provision meaning, the legislature intended to allow boards of equalization and review to set deadlines for the filing of hearing requests. Dixie Building failed to comply with the Guilford County deadline. **In re Dixie Bldg., LLC, 61.**

TAXATION—Continued

Property tax valuation—assessment—presumption of correctness—The taxpayer presented sufficient evidence to rebut the presumption that a property tax assessment was correct and the North Carolina Property Tax Commission erred in dismissing the taxpayer's appeal. Given that the burden on the aggrieved taxpayer was one of production and not persuasion, the taxpayer produced competent, material, and substantial evidence that the assessor's valuation was arbitrary or illegal and substantially exceeded the true value of the property. **In re Appeal of Villas at Peacehaven, LLC, 46.**

TERMINATION OF PARENTAL RIGHTS

Grounds—failure to pay reasonable portion of costs while in foster care—The trial court did not err by concluding that respondent father's parental rights in the minor children were subject to termination on the grounds that he failed to pay a reasonable portion of the cost of the care they received while in foster care as authorized by N.C.G.S. § 7B-1111(a)(3). Record evidence and the trial court's findings established that respondent had the ability to pay some amount greater than zero for the support of the children but failed to do so. **In re S.T.B., 290.**

TRUSTS

By declaration—real property—declaratory judgment—no requirement to execute deed transferring title to self—The trial court erred in a declaratory judgment action by concluding that a trust was never funded with the pertinent real property. When considered together, the trust agreement and the deed created a valid trust by declaration, which included the real property. There was no requirement that decedent execute a deed transferring title from himself to himself as trustee. The documents satisfied N.C.G.S. § 36C-4-401(2) and served as a declaration by the owner of property that the owner held identifiable property as trustee. **Nevitt v. Robotham, 333.**

Constructive trust—summary judgment—The trial court did not err by dismissing plaintiff counties' claim for a constructive trust. Plaintiffs were unable to establish any genuine issue of material fact as to whether defendants had retained monies collected from the rental of accommodations in the respective counties which were acquired through fraud, breach of duty or some other circumstance making it inequitable for defendants to retain it. **Wake Cnty. v. Hotels.com, LP, 633.**

UNFAIR TRADE PRACTICES

Summary judgment—failure to show misrepresentations or reliance—The trial court properly granted summary judgment on unfair and deceptive trade practice (UDTP) claims against certain of the plaintiffs (the Fifth Third Bank plaintiffs) in an action arising from a failed real estate development and inflated appraisals. The Fifth Third plaintiffs were not able to show either misrepresentations or reliance on the allegedly negligent appraisals. **Fazzari v. Infinity Partners, LLC, 233.**

Violation of non-compete agreement—material issue of fact—The trial court erred in granting summary judgment in favor of defendant on plaintiff's claim for unfair and deceptive practices or acts. Since there was a material issue of fact whether defendants solicited business away from plaintiff in violation of a non-compete agreement, plaintiff's allegations also maintained an unfair and deceptive practices claim. Furthermore, plaintiff forecasted sufficient evidence that defendant's breach

UNFAIR TRADE PRACTICES—Continued

of the non-compete was deceptive and was sufficient to maintain an unfair and deceptive practices claim. **Beverage Sys. of Carolinas, LLC v. Associated Beverage Repair, LLC, 438.**

WILLS

Election of remedies—pursuit of elective share of a testate estate and will caveat not inconsistent—The trial court erred in a caveat proceeding challenging a will by granting summary judgment in favor of propounder on the basis of the doctrine of election of remedies. A petition for payment of a spousal elective share was not inconsistent with the institution of a caveat action to contest a will. **In re Will of Shepherd, 298.**

Elective share rights—waiver—fair and reasonable disclosure of property—The superior court erred in a wills case by concluding that an agreement between decedent's daughter (and executrix of the estate) and wife was not an enforceable waiver of the wife's elective share rights. Decedent's wife was provided fair and reasonable disclosure of the property and obligations of decedent's estate. The existence of a lawsuit filed by the estate against Fidelity was not material because it had no relevance to the calculation of the share of the decedent's total net assets to which decedent's wife was entitled. **In re Estate of Heiman, 53.**

WITNESSES

Qualification as expert by court—implicit in admission of testimony—The trial court's qualification of a doctor as an expert in pediatric medicine as well as in the evaluation and treatment of child sexual abuse was implicit in the trial court's admission of her testimony regarding common behaviors in children who have suffered from sexual abuse. **State v. King, 187.**

WORKERS' COMPENSATION

Authorized treating physician—acceptance of change in medical providers—The Industrial Commission did not err in a workers' compensation case by finding that one of plaintiff's doctors was an authorized treating physician. Although plaintiff continued medical treatment with a doctor not authorized to accept workers' compensation patients, defendant UNC had acknowledged and already accepted plaintiff's change in medical providers. **Poole v. Univ. of N.C. at Chapel Hill, 135.**

Automobile accident after holiday lunch—coming and going rule—The Industrial Commission correctly concluded that plaintiffs failed to meet their burden of proving that an automobile accident arose out of and in the course of plaintiffs employment where the accident occurred while they were returning from a holiday lunch in a car owned by defendant. None of the exceptions to the "coming and going" rule fit the situation since the vehicle was provided as an accommodation, plaintiffs were attending a social event, and the risk involved in the travel was common to the public. **Graven v. N.C. Dep't of Pub. Safety, 37.**

Compensable injury—unexplained fall—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's accident was due to an unexplained fall and was, therefore, compensable. The Commission's findings that plaintiff did not know why she fell and that the medical theories explaining the various possible causes of her fall were speculative and unsupported by sufficient

WORKERS' COMPENSATION—Continued

evidence were supported by the record and these finding supported its legal conclusion that plaintiff's fall was unexplained. **Philbeck v. Univ. of Mich.**, 124.

Denial of benefits—prior undisclosed work-related injury increased risk—The Industrial Commission did not err by denying plaintiff's claim for workers' compensation benefits. There was sufficient evidence that plaintiff's prior undisclosed work-related injury increased the risk of sustaining her present injury. **Purcell v. Friday Staffing**, 342.

Jurisdiction—dispute over who must pay plaintiff's claim—The Industrial Commission did not err in a workers' compensation case by determining that it lacked jurisdiction over a dispute between an insurer and its insured regarding premium fraud. Plaintiff's right to workers' compensation benefits and the amount of benefits to which he was entitled had already been decided and the dispute was over who must pay plaintiff's claim. **Salvie v. Med. Ctr. Pharmacy of Concord, Inc.**, 489.

Legal standard—willingness to resume vocational rehabilitation—The Industrial Commission did not err in a workers' compensation case by allegedly applying an incorrect standard. Where plaintiff's declaration of willingness to resume vocational rehabilitation and evidence in support thereof was deemed credible by the Commission, such a finding properly supported the correct legal standard. **Poole v. Univ. of N.C. at Chapel Hill**, 135.

Temporary total disability benefits—inability to earn pre-injury wage—caused by injury—The Industrial Commission did not err in a workers' compensation case by awarding plaintiff temporary total disability benefits beyond the date plaintiff was released to return to work without any permanent restrictions. The Commission's findings were supported by competent evidence, and these findings supported its conclusion that plaintiff was unable to earn her pre-injury wage in the same or any other employment under the second prong of Russell and that plaintiff's inability to earn her pre-injury wage was caused by her injury. **Philbeck v. Univ. of Mich.**, 124.

WRONGFUL INTERFERENCE

Tortious interference with contract—implied-in-fact contract—sufficient forecast of evidence—The trial court erred by granting summary judgment in favor of defendant as to its claim for tortious interference with a contract. Plaintiff forecasted evidence for each element of tortious interference with a contract, including that it had implied-in-fact contracts with third parties based on past business dealings, and there was a material issue of fact as to whether defendants interfered with those contracts. **Beverage Sys. of Carolinas, LLC v. Associated Beverage Repair, LLC**, 438.

Tortious interference with prospective economic advantage—genuine issue of material fact—The trial court erred by granting defendants' summary judgment motion on their claim for tortious interference with a prospective economic advantage. There was a genuine issue of fact whether customers refrained from entering into contracts or continuing previous implied contracts with plaintiff but for defendants' unjustified interference. **Beverage Sys. of Carolinas, LLC v. Associated Beverage Repair, LLC**, 438.

ZONING

Amendment—parking decks—statement of consistency—not sufficient—Summary judgment was erroneously granted for defendant and the intervenors in an action involving a zoning amendment for parking decks, and the matter was remanded for the entry of summary judgment in favor of plaintiffs. The undisputed facts established that the City Council failed to comply with N.C.G.S. § 160A-383 when it adopted the amendment in that it could not reasonably have been said that The Statement of Consistency included an explanation as to why the amendment was reasonable and in the public interest. **Atkinson v. City of Charlotte, 1.**

Board of Adjustment—motion to reconsider—majority vote—The Nags Head Board of Adjustment (BOA) was without authority to consider the merits of a motion to reconsider a zoning variance where the chair of the BOA mistakenly ruled that a motion to deny reconsideration had failed because the vote to deny did not reach the needed 4/5 majority. Under both the North Carolina General Statutes and the Nags Head Town Code, the vote was sufficient to deny the motion to reconsider; a 4/5 vote was needed to grant a variance, but the BOA was not voting on a motion to grant a variance. Moreover, the failure to deny a negative proposition was not the same as adopting a positive proposition. **Osborne v. Town of Nags Head, 121.**

De novo review—vocational school—outdoor firing range—use by right—The trial court erred as a matter of law in a zoning case by concluding that respondent's facility was a vocational school pursuant to the zoning ordinance. Furthermore, the trial court erred by failing to affirm the determination of the Cumberland County's Board of Adjustment that the facility was an outdoor firing range, allowed as a use by right. **Fort v. Cnty. of Cumberland, 541.**

Spot zoning—no reasonable basis—The trial court did not err by granting summary judgment in favor of plaintiffs as to their claim for illegal spot zoning. Defendants conceded that the rezoning constituted spot zoning as defined and the evidence did not show that there was a reasonable basis for the rezoning. **Etheridge v. Cnty. of Currituck, 469.**

Whole record review—land use impacts—recreation/amusement classification—The trial court erred in a zoning case by concluding that there was "no competent evidence" that could support the Cumberland County Board of Adjustment's determination that respondent's facility's land use impacts were most similar to the recreation/amusement classification. **Fort v. Cnty. of Cumberland, 541.**

